Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-853

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION,

Petitioners,

vs.

FORTNER ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
A. The Decision Below Conflicts With This Court's Mandate in This Case as to the Requisite Proof of "Sufficient Economic Power" Where Credit Is the Tying Element in an Allegedly *Per Se* Violation	8
B. The Decision Below Conflicts With the Decision of Another Court of Appeals as to the Requisite Proof of "Sufficient Economic Power" Where Credit Is the Tying Element in an Allegedly *Per Se* Violation	17
C. The Decision Below Raises Significant and Recurring Problems of Great Moment to the General Economy Concerning the Effect of the Antitrust Laws Upon Supplier Financing and Emphasizes the Need for Clarification of This Court's Prior Five-to-Four Decision, Which Has Occasioned Substantial and Continuing Controversy and Uncertainty	20
Conclusion	23

PAGE

Appendices:

A—1971 Opinion of the United States Court of Appeals for the Sixth Circuit A1

B—Opinion of the United States District Court for the Western District of Kentucky B1

C—1975 Opinion of the United States Court of Appeals for the Sixth Circuit C1

D—Listing of Legal Commentaries Devoted to This Court's Prior Decision in This Case..... D1

E—Listing of Cases in Which Credit Alleged to Be the Tying Element in an Unlawful Tying Arrangement E1

TABLE OF AUTHORITIES

PAGE

Cases:

Afroyim v. Rusk, 387 U.S. 253 (1967) 23

Alpha Distributing Co. v. Jack Daniels Distillery, 454 F.2d 442 (9th Cir. 1972) 3, n.2

Anderson v. Home Style Stores, Inc., 381 F. Supp. 402 (E.D. Pa. 1974), *aff'd. w/o opinion*, 511 F.2d 1392 (3rd Cir. 1975) 17

Carlson Companies, Inc. v. The Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1973) 18, n.16

Fortner Enterprises, Inc. v. United States Steel Corp., 293 F. Supp. 762 (W.D. Ky. 1966), *aff'd. w/o opinion*, 404 F.2d 936 (6th Cir. 1968), *rev'd.*, 394 U.S. 495 (1969) .....4, *passim*

Fortner Enterprises, Inc. v. United States Steel Corp., 452 F.2d 1095 (6th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972) .....5, *passim*

Fortner Enterprises, Inc. v. United States Steel Corp., 1975-2 Trade Cases ¶60,521 (6th Cir. 1975) ....5, *passim*

International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957) 23

International Union of Electrical, Radio & Machine Workers v. NLRB, 366 U.S. 667 (1961) 23

SEC v. United Benefit Life Insur. Co., 387 U.S. 202 (1967) 23

United States v. General Motors Co., 384 U.S. 127 (1966) 3, n.2

United States v. Loew's Inc., 371 U.S. 38 (1962) 8

PAGE

Statute:

Section 1, Sherman Act, 15 U.S.C. §1 3

Others:

Dam, "Fortner Enterprises v. United States Steel: 'Neither a Borrower, Nor a Lender Be,'" 1969 Supreme Court Rev. 1 ..... 14, n.13

Editorial, "Review and Outlook: A Peculiar Way to Preserve Competition," The Wall Street Journal, April 21, 1969, p. 18 ..... 14, n.13

Note, "The Logic of Foreclosure: Tie-In Doctrine After Fortner v. U.S. Steel," 79 Yale L. J. 86 (1969) 14, n.13

Note, "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 7 (1969) 14, n.13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on October 3, 1975.

Opinions Below

The opinion of the Court of Appeals in 1971, when it reversed a verdict directed for respondent and remanded for a new trial on the question of liability, is reported at 452 F. 2d 1095 and appears in Appendix A. The opinion

(consisting of findings of fact and conclusions of law) of the District Court for the Western District of Kentucky following the new trial has not been reported but appears in Appendix B. The second opinion of the Court of Appeals, rendered in affirming the judgment entered against petitioners after the new trial, is unofficially reported at 1975-2 Trade Cases, ¶60,521 and appears in Appendix C.[1]

Jurisdiction

The final judgment of the Court of Appeals was entered on October 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Is a *prima facie* case of the economic power requisite to a *per se* tying violation of Section 1 of the Sherman Act proved by evidence consisting solely of

(1) ancillary financing by a supplier on allegedly cheaper, more favorable terms than available elsewhere,

(2) conditioned upon the purchase of a tied product, assertedly at a "non-competitive higher price," and

(3) "customer acceptance of the tie-in,"

particularly where, as the Court of Appeals concluded, there is a failure "to show that other lending institutions

1. Page citations preceded by capital letters (*e.g.*, "B3") are to the appendices to this petition. "JA" references are to the parties' Joint Appendix filed with the Court of Appeals. Throughout this petition, all emphasis in quoted passages has been added unless otherwise noted.

were prevented from offering a loan on equally favorable terms" (*i.e.*, neither legal barriers nor higher costs barred competing lenders from profitably extending credit on such terms) and "soon after [the allegedly uniquely favorable financing was granted] • • • traditional lending agencies in Louisville indeed began offering loans upon the same basis," whereas previously they had not "only because of their unwillingness to take the risk involved?"[2]

Statute Involved

The applicable statute is Section 1 of the Sherman Act, 15 U.S.C. §1. It provides in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •."

2. The quoted language is from the opinions of the Court of Appeals (A14, C9-C10). The trial judge, on the same findings of fact from which he concluded that there was a *per se* tying violation of Section 1, also concluded that petitioners had conspired to monopolize in violation of Section 2 (JA 1603-1604, 1753-1754). The Court of Appeals limited its affirmance to the *per se* tying violation, holding that because "the district court correctly found that a violation of Section 1 was established, it is unnecessary to consider whether the finding of a violation of Section 2 may also be upheld" (C13). If certiorari is granted, petitioners will show that the record and the trial court's findings fail to establish a *prima facie* case of any violation of Section 2 and the findings ignore undisputed evidence which affirmatively disproves any such claim. In those circumstances, because they are based upon incorrect legal standards, the trial court's ultimate conclusions are not "shielded by the 'clearly erroneous' test" of Rule 52(a), F.R.C.P., and this Court is not required to remand for new or supplemental findings. *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-142 n.16 (1966); *Alpha Distributing Co.* v. *Jack Daniel Distillery*, 454 F.2d 442, 453 (9th Cir. 1972).

Statement of the Case

This is a treble damage antitrust action brought under Section 4 of the Clayton Act (15 U.S.C. §15). Respondent, Fortner Enterprises, Inc., alleges that petitioners, United States Steel Corporation and its wholly owned subsidiary, U. S. Steel Homes Credit Corporation, forced Fortner to purchase prefabricated houses from U. S. Steel's Homes Division as a condition to obtaining financing for the acquisition and development of the land upon which the houses were to be erected (JA 38-76, 103-32).

Fortner claims that this land financing was uniquely advantageous in that at the time equally favorable or cheap terms (*i.e.*, loans equivalent to 100% of the cost to Fortner of acquiring and developing the land) were unavailable from other lenders in Louisville, Kentucky. Such a "tying arrangement," Fortner argues, constitutes a *per se* violation of Section 1. Fortner also urges that the arrangement was a conspiracy to monopolize in violation of Section 2.

The District Court originally granted summary judgment dismissing the complaint (293 F. Supp. 762), and the Court of Appeals affirmed without opinion (404 F.2d 936). This Court granted certiorari and held, in a five-to-four decision, that Fortner was entitled to a trial of its claims (No. 306, Oct. Term, 1968; 394 U.S. 495). Following a full trial, the District Court directed a verdict for Fortner on the question of liability, submitting only the damage issues to the jury (JA 196-99, 1016-58, 1063-72, 1072-77).

Petitioners limited their appeal to the liability issues, contending that respondent had failed to prove a *prima*

facie case of any Sherman Act violation and, alternatively, that it was error to direct a verdict for respondent. The Court of Appeals, in its 1971 decision, held that respondent had "made out a *prima facie* case of Sherman Act violations," but it reversed the directed verdict and remanded for a new trial solely on the issues of violation of Sections 1 and 2 (A4, A18-A19).

Petitioners then sought certiorari on the ground that no *prima facie* case of any Sherman Act violation had been established. With the case in the interlocutory posture of a remand for a new trial, this Court denied certiorari (No. 71-1172), Oct. Term, 1971; 406 U.S. 919).

At the new trial, Fortner offered to waive the jury, and petitioners acquiesced. Supplemental evidence was introduced, and the record includes that evidence as well as the evidence from the first trial. The trial judge signed a photocopy of Fortner's proposed findings and conclusions, and entered a judgment that petitioners had violated Sections 1 and 2 (JA 1412-47, 1569; B1-B42). From that final judgment petitioners again appealed.

The Court of Appeals found that Fortner "relies heavily on its view that the Credit Corporation loans were uniquely favorable to establish that [petitioners] possessed the requisite economic power in the credit morket." It held "that the district court's determination that these loans were unique because they were 100% land acquisition and development loans is not clearly erroneous"[3] (C5-C6).

3. The evidence is uncontradicted that the *value* of the land substantially exceeded the Credit Corporation's loans, because respondent's principal, Mr. Fortner, made an equity contribution of certain fully developed lots (the loans amounted to approximately 70 to 80% of the undisputed total value of the land which secured them) (JA 45-71, 106-123, 306, 330-33, 607, 993, 1122, 1218, 1220, 1222, 1230-

(footnote continued on next page)

The Court of Appeals also held that "* * * [Fortner] might prevail even if it failed to show that other lending institutions were prevented from offering a loan on equally favorable terms, if it could show sufficient economic power by other evidence" (C9).

While its 1971 opinion had "emphasized the Supreme Court's rejection of the argument that uniqueness alone constitutes proof of sufficient economic power" (C8), the Court of Appeals, in its second opinion, concluded that the trial court, "in determining that [petitioners] had sufficient economic power in the credit market," was free to evaluate "the evidence of economic power derived from uniqueness" along with other evidence consisting of higher price for the tied product and customer acceptance of the tie-in. The Court of Appeals held that the requisite economic power could properly be inferred from just those three elements "despite the district court's failure to find the factors suggested by the Supreme Court which would

31, 1239, 1241, 1258-59, 1295). The witnesses who testified that 100% loans were unavailable at the time assumed that the cost assigned to respondent in its less than arm's length dealing with Mr. Fortner was the same as the appraised or fair market value of all the lots which secured the loans (JA 221, 821, 824, 836, 868-69, 1004-05, 1635, 1637-38, 1642-43, 1653, 1658-59, 1682, 1695, 1714-16, 1720, 1724-29). The Court of Appeals erroneously concluded, "Since these witnesses were able to testify that a loan for 100% of the cost to acquire and develop property was unique at that time in the Louisville area, it is irrelevant that the percentage of the loan might be characterized in another way" (C6). Loan percentages are determined solely by the *value* of the security (whether or not identical to the borrower's cost) because, as this Court noted, the possible "decline in property values * * * makes it desirable for a creditor to obtain collateral greater in *value* than the loan it secures * * *" (394 U.S. at 505). In disregarding this fundamental principle and thus applying an incorrect legal standard, the courts below committed reversible error in addition to that spelled out as the basis for granting certiorari, because the contention that the challenged financing was uniquely favorable is crucial to Fortner's claims and there is no evidence that 70 or 80% loans were unavailable.

allow uniqueness to be relied upon as the only source of economic power * * *" (C11-C12).

More specifically, as to "the two factors mentioned by the Supreme Court," the Court of Appeals concluded (1) that the trial court had not found that petitioners had any cost advantage in the credit market which prevented other lenders from making 100% land loans and (2) that, while national banks and federal savings and loan associations were legally prohibited from making 100% loans, there was no such evidence "as to the many other types of lending institutions." Similarly, there was no evidence "that *any* lender was prohibited from varying other terms of loans so as to offer equally favorable financing" (C10). To the contrary, the Court of Appeals referred to the trial court's findings[4] that "other lending institutions were not making such high percentage loans only because of their unwillingness to take the risk involved" (C10).

In its first opinion, the Court of Appeals pointed to the undisputed fact that "soon after [Fortner] negotiated its financing terms with the [petitioners] for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis." It held that this fact was relevant to "the ultimate conclusion whether the Credit Corporation had economic power in the credit market" (A14). In its second opinion, however, the Court of Appeals ignored this crucial fact and Fortner's concession in its brief below (p. 38) that the trial judge, in adopting Fortner's proposed findings verbatim, "chose to ignore" it.[5]

4. JA 1601.

5. The witnesses, including Fortner's, testified that within less than a year, in response to such financing by petitioners and others, traditional lending sources in Louisville were making 100% land loans and that such financing was available from those sources thereafter (JA 421-22, 839-44, 1661-62).

Reasons for Granting the Writ

A. The Decision Below Conflicts With This Court's Mandate in This Case as to the Requisite Proof of "Sufficient Economic Power" Where Credit Is the Tying Element in an Allegedly *Per Se* Violation.

Justice Black's majority opinion in this case carefully analyzed the standard of "sufficient economic power" essential to the *per se* tying rule. Dealing first with the situation where the tying product itself is unique, that opinion reiterated the teaching of *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962): "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes" (394 U.S. at 503).

Specifying some degree of "appreciable economic power" over the tying element as necessary, however, the majority equated the requisite power with that enjoyed by a seller of a product sufficiently unique and desirable to force an "appreciable number of buyers" to accept a "higher price because of their stronger preferences for the product." Rather than forcing those buyers to accept a premium price, Justice Black explained, such a seller can choose instead to force them to accept a tying arrangement, thereby foregoing his abnormal profits in the tying market to distort or "prevent free competition for their patronage in the market for the tied product." A seller shown to have the ability to choose between those two alternatives has "sufficient economic power" to invoke the *per se* tying rule.[6]

6. "Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices. * * * Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of *appreciable economic power*. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—*can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product.* Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market" (*Id.* at 503-504).

(footnote continued on next page)

This Court recognized, however, that the tying element in this case—money or credit—is not unique or distinctive in and of itself. Rather it is the most fungible of all commodities.[7] No borrower, therefore, will pay to any lender a higher price or accept less attractive terms than other lenders offer. Consequently, Justice Black dealt with the "somewhat confusing" case where the tying product itself is *not* unique or distinctive and sufficiently desirable to command a premium price (*Id.* at 505, n.2).

First, he rejected Fortner's argument "that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Justice Black and the majority considered such "claims of uniqueness" together with Fortner's allegations that it and other buyers accepted "a tying arrangement obligating them to buy a tied product at a price higher than the going market rate." Contrary to Fortner's contentions thereafter in the courts below, the majority of this

7. Justice Black stated that "money is a fungible commodity—like wheat * * *" (394 U.S. at 509). Justice White asserted that "money [is] the most fungible item of trade since it is by definition an economic counter * * *. The [tying] market here is money, a completely fungible item" (*Id.* at 515, 519).

Court did *not* conclude that such evidence would prove the requisite economic power. Instead, the majority held only that—"read in the light most favorable to" Fortner because "summary judgment in antitrust cases is disfavored" —Fortner's allegations sufficiently "raised questions of fact" to entitle it to a trial of the economic power issue in that those claims "may suggest," "can reflect" or are not inconsistent with "the possibility of market power over borrowers in the credit market * * *"[8] (*Id.* at 500, 504-506).

Second, because financing can be unique only in the sense that one loan may be offered on cheaper or more favorable

8. While differing on summary judgment principles as to whether the necessary supplemental evidence was offered by Fortner, the dissenting Justices agreed that proof of uniquely favorable terms does not prove economic power over credit: "[I]f * * * U. S. Steel was simply offering credit at a lower price, in terms of risk of loss, repayment terms, and interest rate, surely this does not establish that U. S. Steel had market power by any measure in the money market. There was nothing unique about U. S. Steel's money except its low price to petitioner. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the more reasonable inference. One who has such power benefits from it precisely because it allows him to raise prices, not lower them, and ordinarily he does so * * *. I agree with the majority that the affidavits are not *inconsistent* with a 'possibility of market power' and that such power might be shown by showing certain kinds of 'unique economic ability.' But I cannot see how [Fortner] offers to prove this * * *. Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, * * *. Cutting prices in the credit market is more likely to reflect a competitive attempt to offset the market power of others in the tied product than it is to reflect existing market power in the credit market. Those with real power do not offer uniquely advantageous deals to their customers; they raise prices * * *. [Fortner's] allegations that U. S. Steel lowered its price of credit [are not] sufficient to establish market power in credit and I can find no offer by [Fortner] of the necessary supplementary proof" (*Id.* at 514-516, 518-520) (emphasis in original).

terms than other loans,[9] Justice Black focused squarely upon what is necessary to prove "that uniquely and unusually advantageous terms" are in fact the result of "a creditor's unique economic advantages over his competitors." Unlike the tying product which is unique or distinctive and sufficiently desirable to command a premium price, where the tying element is the fungible commodity of credit or money and legal prohibitions do not prevent others from offering the same or equally favorable terms, Justice Black explained that a lender can have the requisite economic power only if he enjoys a unique "cost advantage":

> "Uniqueness confers economic power *only* when other competitors are in some way prevented from offering the distintive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e.g., International Salt; Loew's,* or physical, as when the product is land, *e.g., Northern Pacific.* It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." (*Id.* at 505, n.2)

A cost advantage over competitors would give a lender higher than normal profits (like those earned by the seller of a distinctive product which commands a premium price). Alternatively, he could use this advantage or economic power in the credit market to induce acceptance of a tie-in

9. See 394 U.S. at 504 ("* * * no such financing was available to his corporation on any such cheap terms from any other source * * *"); *id.* at 505 ("They could well mean that U.S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates"); *id.* at 515 ("There was nothing unique about U. S. Steel's money except its low cost to [Fortner]").

by reducing his "price" (*i.e.*, offering more favorable loan terms) to a level at which competitors could not profitably lend, thereby distorting competition on the merits in the tied product market. Consequently, this Court held, economic power over the tying element could be established in this case only by proof that other lenders were prevented from offering equally favorable financing (1) because legally prohibited from doing so or (2) because petitioners had a cost advantage and higher profitability. In sum, the crucial inquiry mandated by this Court is not whether comparable financing was *available* from competitors but whether they lacked the *ability* to offer equally attractive loans at a profit.[10] Unless other lenders were shown to be unable to match the cheapness or attractiveness of their loans, then petitioners could not have the requisite economic power.

Absent such proof of economic power, Justice Black and the majority stated that "advantageous credit terms may be viewed as a form of price competition in the tied product." A seller can legitimately achieve such price reduction for the tied product, they said, as long as the cheaper tying element he offers consists of ancillary benefits "over which he has no economic power"[11] (*Id.* at 508). They concluded:

10. In the language of Justice Black's opinion, the issue is whether the "Credit Corporation had a unique economic ability to provide 100% financing at cheap rates" in that competing lenders "could not profitably lend money on the risks involved" because petitioners had "achieved economies of scale in their credit operations" (*Id.* at 505-506, 509).

11. Justice White, for the dissenters, agreed: "* * * [T]he low price of credit is functionally equivalent to a reduction in the price of the houses sold. * * * Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market" (*Id.* at 515, 518).

> "It may also be, of course, that these allegations [of market power] will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market" (*Id.* at 506).

With deference, petitioners submit that the Court of Appeals has misconceived the mandate of this Court, and its decisions in this case are in direct conflict with that mandate. Indeed, in its uncertainty as to what proof is necessary to establish the requisite economic power where credit is the tying element, the Court of Appeals has wavered and faltered to the extent that its two opinions are mutually inconsistent and fail to spell out any basis in law, logic or economics for its conclusion that Fortner made out a *prima facie* case of such power.[12]

Significantly, the Court of Appeals concluded in its first opinion that this Court, in reviewing this case, had "refused to specify precisely what proof would satisfy the [market power] standard of the *per se* rule" (A11). This reading of Justice Black's opinion is mistaken, as noted above. The Court of Appeals erroneously assumed that the two barriers to the ability of competing lenders to match petitioners' loan terms specified by Justice Black were not the only possible sources of economic power over credit:

> "It was apparently the view of the [Supreme] Court that * * * [Fortner] must prove that the 'unique and unusual' terms offered by the Credit Corporation

12. In applying the standards of the *per se* rule to this case, the Court of Appeals, in its first opinion, found that the issue "raised regarding the second standard, that of 'sufficient economic power,' is far more troublesome * * *." The court emphasized its difficulty with this issue, stating that, "In other Supreme Court cases * * *, this question did not pose the same factual uncertainty as here" (A11).

reflected some unique economic advantage over its competitors. The Court pointed to *two possible* sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. *The Court did not preclude the possibility of other sources of leverage''* (A13).

This Court's opinion and economic logic, however, compel the conclusion that a lender could have economic power in a credit market populated by many lenders only if he enjoyed one or both of the advantages articulated by Justice Black.[13] Only then could other lenders be unable to offer equally cheap or favorable financing. As noted previously (p. 7), with respect to the only two possible sources of power over credit, as specified by Justice Black, the Court of Appeals noted the absence of any finding that petitioners

13. See Note, "The Logic of Foreclosure: Tie-In Doctrine After *Fortner* v. *U. S. Steel*," 79 Yale L.J. 86, 97-98 (1969) ("The only thing peculiarly attractive about U. S. Steel's offer was the low price of the tying product compared with the price of an identical product from other sources. * * * The [Supreme Court in Fortner] correctly identified the situations where foreclosure can result from a uniquely low price on an otherwise undifferentiated product as those in which the tying seller has some cost advantage over his tying market competitors"); Note, "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 7, 241 (1969) ("Because the money market is composed of many sellers and the product is fungible, the only arguable basis of power in credit is greater efficiency. The greater-than-normal-profits test of economic power * * * is the only test helpful in determining the existence of economic power in this situation. Therefore, on remand the district court will, despite the difficulty, have to use the profits test"); Dam, "Fortner Enterprises v. United States Steel: 'Neither a Borrower, Nor a Lender Be,'" 1969 Supreme Court Rev. 1, 27 ("In the absence of a patent or copyright where competitors are 'prevented from offering the distinctive product themselves,' economic uniqueness could only prevent competitors from offering the product if the seller had a 'cost advantage in producing it'").

had a cost advantage in the credit market and concluded that many lenders were legally free to make 100% or equally favorable loans. In fact, the Court of Appeals failed to find any competitive advantage that petitioners had over other lenders.

That the Court of Appeals misconstrued this Court's mandate on the proof of power over credit is further evidenced by its retreat from positions it took in its first opinion. That opinion recognized that it was "the view of the [Supreme Court that Fortner] * * * must prove that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors"[14] (A13). The Court of Appeals held that at the new trial the fact-finder should decide "whether competitors in the Louisville credit market were precluded from offering credit on such terms"—whether other lending institutions were "unable to offer terms * * * equally favorable or advantageous" (A13-A14). By contrast, in its second opinion the Court of Appeals held directly to the contrary; Fortner could "prevail even if it failed to show that other lending institutions were prevented from offering a loan on equally favorable terms, if it could show sufficient economic power by other evidence" (*i.e.*, more favorable loan terms, a higher price for the tied product, and customer acceptance of that tie-in) (C9, C11).

The failure to follow this Court's mandate is emphasized by the uncontested fact, previously noted (p. 7), that traditional credit sources in Louisville have been able

14. The first opinion also declared, "[W]e are here dealing * * * with the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market" (A16).

to and have in fact granted 100% land loans continuously since shortly after the challenged financing of Fortner. No single fact could be more responsive to the issue mandated by this Court—*i.e.*, whether other lenders were unable to offer the same or equally attractive terms because legal barriers or some unique cost advantage prevented them from doing so profitably. Both the trial court and the Court of Appeals in its second opinion, however, ignored this crucial fact. If petitioners had the claimed economic power over credit when they agreed to finance Fortner's land acquisition in August, 1961, what changed circumstances (unarticulated by Fortner and the courts below) explain how that power vanished in the few intervening months before July, 1962, when traditional lending institutions were concededly making 100% loans?

Similarly, as noted earlier (p. 7), the trial court and the Court of Appeals concluded that other lending institutions were not making 100% loans earlier simply because of their unwillingness to assume the risk of loss. The necessary implication of this finding is that other lenders were *able*, even at the time of petitioners' financing of Fortner, to offer equally favorable terms even though they chose not to do so to avoid the risk of lower profits. The lower courts' disregard for this fact flies full in the face of this Court's mandate. Further, because the evidence is that 100% financing by the conventional Louisville lenders was a response to such financing by other suppliers (and allegedly by petitioners), the decisions below are antithetical to the philosophy and objectives of the Sherman Act.[15]

15. As Justice White stated in this case: "A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the hard and risky competition which it is the policy of the

(footnote continued on next page)

B. The Decision Below Conflicts With the Decision of Another Court of Appeals as to the Requisite Proof of "Sufficient Economic Power" Where Credit Is the Tying Element in an Allegedly *Per Se* Violation.

The decision of the Court of Appeals in this case is in direct conflict with a decision of the Third Circuit on the very same factual assertions and issues of law. That Third Circuit decision was rendered just this year, so that the conflict did not exist when this Court denied certiorari following the Sixth Circuit's 1971 interlocutory decision in this case.

The Sixth Circuit held that the fact-finder could conclude that petitioners had economic power over credit from evidence of (1) uniquely favorable loan terms unavailable elsewhere, (2) an allegedly higher price for the tied product, and (3) customer acceptance of that tie-in (C11-C12). In a case squarely in point, *Anderson* v. *Home Style Stores, Inc.*, 381 F. Supp. 402 (E.D. Pa. 1974), *aff'd. w/o opinion*, 511 F.2d 1392 (3rd Cir. 1975), the Third Circuit affirmed a verdict directed for defendants at the end of plaintiffs' case dismissing a *per se* tying claim in which purchase of the defendants' goods was tied to credit. That decision sustained a holding that evidence of the same three elements upon which the Sixth Circuit affirmed the finding of economic power over credit in this case need not be submitted to a jury, because proof of such power requires a

Sherman Act to encourage. * * * Of course, if the credit was unavailable elsewhere because U. S. Steel was a monopolist of credit in a relevant market—which [Fortner] does not assert—the tie would be illegal. But here it was evidently unavailable elsewhere simply because others were not willing to match U. S. Steel's low price for acceptance of high risk" (394 U. S. at 517).

showing that other lenders were unable to offer equally favorable terms.

More specifically, the *Anderson* case expressly rejected the plaintiffs' argument that this Court's decision in "*Fortner* allows a jury to infer sufficient economic power over the tying product from a number of different kinds of evidence * * *, [*i.e.*,] the number of buyers who had accepted the tying arrangement, * * * the fact that plaintiffs or others in plaintiffs' position had been willing to pay a higher than competitive price for the tied product, * * * [and] the uniqueness or desirability of the tying product, * * *" (381 F. Supp. at 405):

> "While the existence of an appreciable number of buyers may properly give rise to an inference of market power in other contexts, we believe that such a standard is inapplicable here because the only source of market power claimed by plaintiffs was the unavailability elsewhere of the credit necessary to enable them to enter business. Another word for unavailability is uniqueness. The *Fortner* case made it clear that uniqueness of the terms of the credit or, as in this case, the credit itself is not enough to make out the requisite economic power. The unavailability of credit elsewhere *must reflect legal, physical or economic barriers which prevent defendants' competitors in the credit market from offering such credit.* There is no question in this case of any *legal or physical inability* on the part of other lenders in the credit market to offer loans to plaintiffs in the amounts required to go into business; therefore, the *only* remaining area in which defendants could have an *advantage* of their competitors is economic, i.e., where the *'competitors are simply unable to produce the distinctive product profitably* * * *' 394 U.S. at 505 * * *. Plaintiffs have utterly *failed to show that defendants enjoyed a cost*

> *advantage* in making their guarantees of plaintiff's financial arrangements *or that defendants' competitors were unable to make equivalent financial arrangements profitably* * * *'[16] (*Id.* at 406).

Petitioners, while urging that the views of the Third Circuit in *Anderson* are correct,[17] submit that its direct and

16. *Cf. Carlson Companies, Inc.* v. *The Sperry & Hutchinson Co.*, 374 F. Supp. 1080 (D. Minn. 1973), where the plaintiff alleges that credit is the tying element in a *per se* violation and claims that tie-ins involving substantial dollar volume have been accepted by an appreciable number of buyers. In an interlocutory opinion, the court stated: "In *Fortner*, the [Supreme] Court indicated that barriers may result from the inability of competitors to produce the distinctive product profitably and that economic power is conferred 'only when other competitors are in some way prevented from offering the distinctive product themselves.' * * * Thus it becomes apparent that the court in an economic uniqueness case must look to the economic ability of competitors to offer similar programs before an antitrust violation may be found" (*Id.* at 1087). Petitioners are advised that trial of this case and these issues is imminent.

17. By contrast, the Sixth Circuit in this case has wholly failed to explain how uniquely cheap or favorable financing coupled with evidence of a higher than competitive price for the tied product and acceptance of such a tying arrangement even by numerous buyers and affecting substantial sales of the tied product prove power over credit or any advantage over competing lenders. To the contrary, notwithstanding its emphasis upon this Court's rejection of "the argument that uniqueness alone constitutes sufficient economic power," the Sixth Circuit's opinion is muddied by such statements as "Pointing out that the Supreme Court did not determine precisely what effect the comparatively higher prices for the Homes Division houses should have, we said that the probative value of this evidence should be determined by the trier of facts" and "We have recognized that customer acceptance of the tie-in without more is not sufficient to show economic power and have suggested that a non-competitive price is of uncertain probative value," followed by the inexplicable, "Yet, a number of such factors considered together may be sufficiently probative" (C8, C9). As this Court recognized, a lower price for a fungible product or service fails to prove either the existence or absence of market power. At most, it merely poses the question whether the seller is uniquely able to offer the lower price because he enjoys economic power in that others are at a competitive disadvantage, preventing them from offering the same product or service at the same price. A fungible commodity offered at a lower price will inevitably attract

(footnote continued on next page)

irreconcilable conflict with the Sixth Circuit's decision in this case demonstrates the pressing need for the exercise of this Court's jurisdiction now to achieve uniformity among the courts of appeals and district courts because, as amplified hereafter, the issues of law here—crucial to the disposition of this case and many others, as well as to the daily conduct of supplier-dealer and supplier-customer relationships—are of great magnitude to the economy and are of demonstrably frequent occurrence in litigation before the lower courts.

C. The Decision Below Raises Significant and Recurring Problems of Great Moment to the General Economy Concerning the Effect of the Antitrust Laws Upon Supplier Financing and Emphasizes the Need for Clarification of This Court's Prior Five-to-Four Decision, Which Has Occasioned Substantial and Continuing Controversy and Uncertainty.

The importance of this case far transcends mere resolution of the dispute between the parties. This much publicized and often misunderstood case has had and will continue to have substantial, far-reaching precedential impact in an area of antitrust law vital to everyday, commonplace

buyers. Therefore, where credit is offered at a lower price, acceptance of a tying condition, even by many buyers attracted by its lower price, is at most evidence that the terms are in fact uniquely cheap or favorable (and that fact, as this Court held, does not prove power). Similarly, even if any buyer believes the tied product to be over-priced *at the time he accepts the tying condition* (there is no such finding here and the evidence of record is solely to the contrary), he will accept the tie-in only because he concludes that the saving realized on the cheaper or more favorable credit compensates for the higher price of the tied product. Consequently, evidence of a higher price for the tied product, also, is at most evidence that the loan terms are in fact uniquely cheap or favorable (and that fact, as this Court held, does not prove power).

financing arrangements with suppliers ancillary to sales transactions involving much of the business community. Its importance is underlined by the fact that the issue upon which it turns, while no longer novel, has continued to be raised in numerous cases, with confused and conflicting results. An early and definitive ruling by this Court is imperative in the interests of the courts and litigants as well as to provide clear guidance to businessmen and their counsel.

The majority and dissenting opinions of this Court all recognized that financing conditioned upon the purchase of a lending seller's goods is a widespread and significant phenomenon in the nation's economy—one which has promoted competition and the advent of small, independent businesses, not just in connection with the burgeoning franchise phenomenon but elsewhere as well (394 U.S. at 507, 511, 515-517, 524-25).

As the Court of Appeals noted in its first opinion, "The majority and minority opinions [of the Supreme Court] in this case have stimulated much general interest and wide scholarly examination" (A2). A partial listing of the many legal commentaries which have attempted to analyze this Court's prior decision is set forth in Appendix D. Those commentaries have reached sharply conflicting conclusions as to the meaning of the decision and what is necessary to prove a *per se* tying violation where supplier financing is challenged.

In addition, the decision by this Court has attracted widespread attention in the business community and has been characterized as substantially inhibiting if not pre-

cluding supplier financing and extension of credit to dealers and customers, at least if on favorable terms (as is the norm).[18] In fact, even the dissenting opinions expressed concern as to the possibly damaging impact of the Court's decision, Justice White noting that "The logic of the majority opinion * * * casts great doubt on credit financing by sellers" and Justice Fortas stating that the effect of the decision "may be vast and destructive," amounting to a use of "the antitrust laws themselves as an instrument in restraint of competition" (394 U.S. at 516, 524-525).

Since this Court's decision, it has been alleged in literally dozens of cases that credit was the tying element in an unlawful tying arrangement. The issue has been asserted in claims, counter-claims and affirmative defenses in district courts across the country (and even in several state courts), all of which have looked to this Court's decision for guidance with sharply differing conclusions as to its meaning. A partial listing of only those actions (including a number of class actions) in which an opinion spelling out the existence of the self-same issue has been written appears in Appendix E. The issue is alive in pending cases awaiting trial and is bound to be asserted in cases yet to be brought.

Petitioners submit that it is imperative that this Court review the decisions below in view of the importance to the general economy of clear and correct guidelines for the proper application of the antitrust laws in the vital area of supplier financing. Particularly is that true inasmuch

18. See, for example, the editorial entitled "Review and Outlook: A Peculiar Way to Preserve Competition," The Wall Street Journal, April 21, 1969, p. 18.

as the decision below purports to be premised upon the prior decision of this Court—a decision which is in need of clarification (see *SEC* v. *United Benefit Life Insur. Co.*, 387 U.S. 202, 207 (1967)) and which, decided more than six years ago by a five-to-four vote, has been a source of controversy and confusion ever since (see *Afroyim* v. *Rusk*, 387 U.S. 253, 255-256 (1967)). The extensive recurrence of the question here and the conflicting treatment it has received fully merit this Court's definitive restatement of the governing principles (*International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 287 (1957); *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 671 (1961)).

Conclusion

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 18, 1975.

APPENDICES

Appendix A

1971 Opinion of the United States Court of Appeals for the Sixth Circuit

No. 71-1194

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FORTNER ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

UNITED STATES STEEL CORPORATION and
UNITED STATES STEEL HOMES CREDIT CORPORATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division

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Decided and Filed December 16, 1971.

Before: MILLER and KENT, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This is the second appeal in this private antitrust action.[1] At the first trial the district court granted summary judgment for the defendants, holding that petitioner had failed to raise any question of fact as to a possible violation of the antitrust laws. *Fortner Enter-*

1. The action was instituted by Fortner Enterprises, Inc. against U. S. Steel Corporation and its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation, pursuant to Secs. 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2, seeking treble damages and injunctive relief against further violations.

prises, Inc. v. *U. S. Steel Corp., et al.*, 293 F.Supp. 762 (1966). The judgment was affirmed by this Court without opinion but the Supreme Court in a 5-4 decision, holding on the facts set forth in the record as it was constituted at that time, that summary disposition was improper and the action should go to trial, reversed the judgment of affirmance of this Court and remanded the action with directions that it proceed to trial. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969). The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination.[2] Upon remand, the district judge, after a trial before a jury which occupied approximately one month, sustained the plaintiff's motion for a directed verdict and overruled the defendants' similar motion. He submitted to the jury only the question of damages which should be awarded in favor of the plaintiff. The jury returned a verdict in the amount of $93,200.00 which was trebled by the court. Motions for judgment

2. We are aware of the controversy which surrounds the tying arrangement cases generally, a controversy involving differences over both economic policy (See, e.g. Markovitz, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 Yale L.J. 1397 (1967); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); and the proper application of legal doctrine (See, e.g. Kauper, *The Warren Court and the Anti-trust Laws: Of Economics, Populism and Cynicism*, 67 Michigan L.Rev. 325 (1968); Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW.L.Rev. 626 (1965). We have studied with interest and special care the scholarly comments which the Supreme Court's opinions in this case have generated, finding especially useful a note: *The Logic of Foreclosure: Tie-in Doctrine after Fortner* v. *U. S. Steel*, 79 Yale L.J. 86 (1969). See also, Dam, *Fortner Enterprises* v. *United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Review 1; *Recent Trends in Supreme Court Antitrust Decisions: Commentary—Past, Present and Future*, 38 Antitrust Law Journal 602 (1969); Note, *Credit As a Tying Product*, 69 Col.L.Rev. 1435 (1969); and The Supreme Court, 1968 Term, 83 Harv.L.Rev. 235.

n.o.v. and, alternatively, for a new trial were denied and judgment for plaintiff was entered on November 23, 1970. The defendants raise no question on the present appeal as to damages, having elected to limit the appeal to the issue of liability under the Sherman Act. Their insistence is that the court erred in directing a verdict in favor of the plaintiff and that, on the contrary, the court should have sustained the defendants' motion for a directed verdict. It is argued, in the alternative, that at least the case was one for the jury and that the action should be remanded for a new trial before a jury on the question of liability only, the damage issue already having been decided by a jury.

In its original and amended complaints the plaintiff charged that the defendants had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. Alleging that there was a continuing agreement between the defendants to force the plaintiff and other corporations and individuals, as a condition to availing themselves of the services of the Credit Corporation, to purchase at artificially high prices only U. S. Steel Homes, plaintiff specifically claimed that in order to obtain loans totaling over two million dollars from the Credit Corporation for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel Corporation on each of the lots purchased with the loan proceeds. It was further claimed that the prefabricated materials were then supplied by U. S.

Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development.

To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make only a "one way" verdict possible, a directed verdict is improper. *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479-80 (1943); 5A *Moore's Federal Practice* ¶50.02[1] pp. 2321, 2. An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); 5A *Moore's Federal Practice*, ¶50.02[1] pp. 2326, 7.

Examining the record on the basis of these standards and in the light of the Supreme Court's opinion in this case, we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict. Instead the question of liability should have been submitted to the jury as well as the question of damages. Both the plaintiff and defendants to support their respective positions rely upon the Supreme Court's opinion in this case on the first appeal. In doing so they quote selective portions from the opinion which

tend to indicate some support for the particular views which they espouse. It becomes necessary, therefore, in the resolution of this appeal to examine the Supreme Court's opinion to discover its real thrust and impact in the context of the facts of the present litigation as they were developed at the second trial.

At the outset it is well to bear in mind that on the first appeal the Supreme Court was not considering the alleged antitrust violations in the light of a full trial on the merits. Rather the specific question before it was a procedural one, i.e., whether it was appropriate for the district court on the basis of the facts as they had been developed from affidavits and pretrial procedures to dispose of the case by summary judgment. That the Court did not intend to indicate any view as to what the trier of the facts should find from the evidence was expressly pointed out when the Court said that it might turn out that the plaintiff's allegations will not be sustained when the case goes to trial. "It may turn out," as the Court further stated, "that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such a conclusion as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." It is also of significance that the Court indicated its reluctance to dispose of antitrust cases by summary procedure. Addressing itself specifically to the use of summary judgment procedure in antitrust cases, the Court stated: "Since summary judgment

in antitrust cases is disfavored, *Poller*,[3] *supra*, the claims of uniqueness in this case should be read in the light most favorable to petitioner." (Plaintiff).

It was developed at trial that the Homes Division of U. S. Steel manufactures component parts for prefabricated houses, selling what it terms home packages in various states. The sales are made through dealer-builders such as the plaintiff. U. S. Steel's subsidiary, the Credit Corporation, was founded in 1954 as a wholly owned subsidiary for the purpose of providing financial assistance to the Homes Division's dealer-builders who were unable to obtain suitable financial assistance from more conventional sources. In effect the services of the Credit Corporation were a "tool" to assist the Homes Division in the sale of its houses. Beginning in 1958 the policies of the Credit

3. In *Poller* v. *Columbia Broadcasting Co., Inc., et al.*, 368 U.S. 464, 473 (1962), the Court in stating that summary procedures should be used sparingly in complex antitrust litigation used language which we think is of significance in determining the appropriateness of directing a verdict in this case rather than submitting the issues to a jury for evaluation:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Although summary judgment and a directed verdict are procedurally distinguishable both substitute the court for the jury as the fact-finder. Some of the considerations dictating a reluctance to resort to summary judgment in complex antitrust cases are equally applicable to the direction of a verdict.

Corporation were changed, when a program of "special assistance" was initiated whereby credit was made available in high risk situations on particularly reasonable terms to Homes Division dealer-builders. As reflected by the minutes of the U. S. Steel finance committee, the purpose of the policy was to enable Homes Division "to attain a minimum of 1800 units in 1959 . . . To reach this goal and such additional distribution as may be feasible the Credit Corporation was directed to make loans to dealers without conformity to conventional or conservative patterns "but within the bounds of prudent business judgment." It was contemplated that Homes Division would underwrite such loans, guaranteeing losses to a defined extent.

In 1959 it came to the attention of the Homes Division that certain land in an existing subdivision in the Louisville, Kentucky, area might be available for development. The land was owned by a corporation in which A. B. Fortner, a successful and well-known real estate developer, held a 50% interest. Later in that year U. S. Steel initiated discussions with Fortner with the idea that the property might be an attractive vehicle for it to enter the Louisville prefabricated housing market. Following negotiations an agreement was reached whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would become a franchised dealer-builder of the Homes Division product. It was part of the agreement that the Credit Corporation would extend credit to the plaintiff corporation for the development conditioned upon the construction on each of the 187 lots purchased by the plaintiff [of] a prefabricated house from the Homes Division of U. S. Steel. The initial

loan was $2,055,300.00. Interest at the rate of six per cent per annum, plus a service charge of one-half of 1% was to be charged. Of the total commitment, $373,200.00 was to cover the cost of acquisition and development of the lots; the remainder was to cover the purchase and construction of the houses. The land loan equaled 100% of the cost of the land acquisition and development.

There was evidence that the plaintiff experienced difficulties with the U. S. Steel products, including the omission of parts and the delivery of defective parts which necessitated additional work. Substantial complaints were made with respect to the Homes Division products from home owners who had purchased the homes from Fortner. Yet during this period Fortner requested additional financing for the purchase and development of land on which Homes Division houses were to be placed. Thus, on August 2, 1961, Fortner executed a land and mortgage note in the amount of $59,000.00 and a construction note in the amount of $403,400.00. Having continued to experience difficulties with the prefabricated houses and having run out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. This request was refused but Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources. Thereafter, in July 1962 he instituted the present action.

In *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1958), the Supreme Court defined the tying arrangement device, identified its evils and stated the prerequisites for per se illegality in the following fashion:

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594.

They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co.* v. *United States,* 332 U. S. 392. Cf. *United States* v. *Paramount Pictures,* 334 U. S. 131, 156-159; *United States* v. *Griffith,* 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell

> flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. 356 U. S. at 5, 6 and 7.

Once it is established that a tying arrangement exists, it must be determined whether a "not insubstantial" amount of commerce is affected by the tie and whether the tier has "sufficient economic power" in the market for the tying product.

We need not deal at length with whether a "tying arrangement" exists in this case, nor whether the amount of commerce affected is "not insubstantial." The Court rejected Mr. Justice Fortas' argument that this was not a "tying arrangement":

> We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional sort. 394 U.S. at 498.

On the matter of whether the volume of commerce allegedly foreclosed was "not insubstantial" the Court stated:

> The complaint and affidavits filed leave no room for doubt that the volume of commerce allegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded $190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial."* 394 U.S. 501, 2. (Emphasis added).

The issues raised regarding the second standard, that of "sufficient economic power," is far more troublesome, but we think that so far as the present record reflects, the issue should have gone to the jury. Of this issue, Mr. Justice Black stated that "• • • the pleadings and affidavits sufficiently disclose the *possibility* of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." (Emphasis added.)

In other Supreme Court cases in which a "tying arrangement" has been found to be illegal per se under the Sherman Act, this question did not pose the same factual uncertainty as here. Sufficient economic power was shown in *International Salt Co.* v. *United States,* 332 U.S. 392 (1947), by the simple fact that the tying product was patented; in *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962), the tying product was copyrighted; and in *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1958), it was the physical uniqueness of the land which constituted the tying product.

Here no such talisman exists. The Court rejected Fortner's "apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Having done so, however, the Court refused to specify precisely what proof would satisfy the standard of the per se rule. Yet the Court was not entirely silent as to the sort of proof which could be weighed in determining the existence of the necessary "economic power" in the tying product.

Under the antitrust statutes, the tying cases are fundamentally based on the notion that competitive advantage in

one market (that of the tying product), whether the result of a patent, copyright, physical uniqueness, a cost advantage or whatever else might serve as a source of leverage, should not be translated into a competitive advantage in another distinct market (that of the tied product).

The focus of our present inquiry is whether the Credit Corporation possessed leverage in the credit market (the "tie" here being the extension of credit) sufficient to induce buyers in the market for prefabricated houses (the "tied" product) to accept a less competitive product.

It is clear that such leverage need not be of sufficient magnitude to constitute monopoly power or even market dominance. As stated in the majority opinion in this case:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market. See, *e.g., International Salt; Northern Pacific; United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). 394 U.S. at 502, 3.

And in *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), the Court stated:

> • • • Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. 371 U.S. at 45.

As we have pointed out, the Court expressly rejected Fortner's "apparent" argument that the uniqueness of the loan, namely the fact that one hundred per cent land financing may have been unavailable elsewhere in Louisville at the time the loan commitment was made, alone constitutes proof of "sufficient ecenomic power." It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, it must prove that the "unique and unusual" terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to two possible sources of such advantge: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. The Court did not preclude the possibility of other sources of leverage.

Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judicial notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies. A jury should be permitted to evaluate the

significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case there was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriately considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to come within the per se rule. Further, while the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors, as appropriately pointed out by the defendants, include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower.

As the second factor suggested by the majority opinion (that of a possible cost advantage) we again find that the record is open to varying interpretations, inferences and conclusions. It is true that the Credit Corporation as a wholly owned subsidiary of U. S. Steel was able to obtain funds for lending purposes at the prime rate, and that U. S. Steel necessarily stood behind repayment of any funds which the Credit Corporation was required to borrow. Also, as a subsidiary of U. S. Steel, it may be inferred that the Credit Corporation was not expected to maximize profits but to assist in the sales of the Homes Division houses. During the relevant period no dividends were paid to the parent corporation and there is no evidence that the Credit Corporation competed aggressively as a lender. These considerations could conceivably be taken by a jury as some evidence that the Credit Corporation was able to make loans at a level of risk unacceptable to most lending institutions. On the other hand, the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59,053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years. There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation. Of course, the Credit Corporation, as the evidence demonstrated, incurs the usual operating costs of a lending institution, including clerical and management

salaries, rent, charges for office equipment, supplies, services, taxes, etc. Moreover, it would be relevant for the jury to take into account that the Credit Corporation operates at some disadvantage in that traditional lending agencies doing business in a community on a continuing basis serve a concentrated geographic area having a larger and more diversified clientele of borrowers permitting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the Credit Corporation. It is also possibly true that traditional lending institutions are in position to spread their risks and costs both over a larger volume of business and over different areas of the economy.

The Credit Corporation obtained its funds primarily from banks. In 1961 it had borrowed from banks approximately ten to fourteen million dollars. For the borrowing of these funds it paid the prime rate. On the funds which it borrowed from U. S. Steel it paid the prime rate plus one per cent. It may be that the jury could infer from the record that the Credit Corporation incurred higher costs in acquiring money to lend than the costs incurred by commercial banks, savings and loan associations and insurance companies. In this connection it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.

Plaintiff also points to the fact that the Homes Division guaranteed or underwrote the land financing extended to plaintiff and certain others. It is argued that this fact demonstrates economic power over credit. This conclusion, in our view, is not necessarily true. On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved. Doubtless other lending institutions in the relevant market were of sufficient strength and soundness to inspire confidence in their loan commitments.

Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400.00 higher than comparable houses would not appear to have any conclusive effect on the question which we are now considering. It is clear from the opinion that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential "may suggest" or is not inconsistent with the "possibility of market power." The evidence on this question should be weighed by the jury and its proper probative value determined.

While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the

majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act.

In *Advance Business Systems & Supplies Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Court, as the plaintiff argues, interpreted *Fortner* as holding that "'* * * the 'sufficient economic power' test of per se illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in with respect to any appreciable number of buyers within the market.'" Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of *Fortner* by the Fourth Circuit. As we read the majority opinion in *Fortner*, the holding was that a tying arrangement achieves an unlawful restraint when "the seller can exert some power over some of the buyers in the market." The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.

The judgment of the district court insofar as it sustained the plaintiff's motion for a directed verdict is accordingly reversed, and the action is remanded to the district

court for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed insofar as it denied the defendants' motion for a directed verdict.[4]

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4. We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. Plaintiff relies heavily, for example, upon evidence tending to indicate that the Credit Corporation was both able and willing to lend to high risk borrowers at a rate of interest commensurate with a much lower level of risk, i.e., to offer credit on terms otherwise unavailable at the time. The guarantees and the Credit Corporation's relationship to U. S. Steel are pointed to as possible sources of leverage. Upon remand, these items and the entire range of evidence bearing upon this issue should be submitted to the jury. Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that the amount of commerce affected is "not insubstantial." On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al.* v. *United States, supra*, had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *." Admittedly this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence (some of which we have commented upon), free from the limitations of an arbitrary definition.

Appendix B

Opinion of the United States District Court for the Western District of Kentucky

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 4392

FORTNER ENTERPRISES, INC.,
Plaintiff,

v.

UNITED STATES STEEL CORPORATION and
UNITED STATES STEEL HOMES CREDIT CORPORATION,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND OF THIS LITIGATION

This action was originally filed in 1962 and has had a long history in this and the Appellate Courts since then. Plaintiff, Fortner Enterprises, Inc., is claiming violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2. In 1966 this Court sustained the Motions of defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation] dismissing plaintiff's Complaint as amended [293 F. Supp. 762]. The Sixth Circuit Court of Appeals affirmed without Opinion.

The Supreme Court reversed and remanded the action to this Court with directions for the case to proceed to trial. Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 [1969]. The Supreme Court's comprehensive Opinion set forth the guidelines for this Court to follow in trying this case before a jury.

During the month of June, 1970, this case was tried before a jury. At the close of all the evidence both plaintiff and defendants moved for directed verdicts on liability. After considering the evidence presented in light of the Supreme Court's Opinion, this Court felt that the undisputed facts established all of the elements of an illegal tie-in agreement which constituted a per se violation of Section 1 of the Sherman Act by both defendants and, therefore, directed a verdict for plaintiffs as to liability. The questions of causation [fact of damage] and amount of damages were submitted to the jury which found for plaintiff and awarded a verdict of $93,200.00. That sum was duly trebled in accordance with the antitrust laws and attorneys' fees and costs were awarded.

Defendants filed Motions for Judgment N.O.V. and New Trial which were overruled. Defendants then appealed to the Sixth Circuit which reversed in part only at 452 F. 2d 1095. The Sixth Circuit found that the facts were undisputed as to two of the three elements of an illegal tie-in agreement, namely, that a tie-in did exist and that a not insubstantial amount of interstate commerce in the tied product was affected, but found that there were varying inferences which a jury might draw from the evidence concerning the third element, sufficient economic power over

the tying product. It appeared clear from the Sixth Circuit Opinion to this Court and counsel for all parties that only limited issues of liability were to be retried, with plaintiff to keep its damage Judgment if liability is decided in its favor.

Retrial of the liability issues was scheduled before a jury on November 12, 1973. On that date prior to the commencement of trial plaintiff offered to waive jury trial if defendants agreed and to allow this Court to decide the issues as fact finder based on the record from the 1970 trial plus any additional evidence to be offered by either side. Defendants agreed.

Plaintiff's purpose in waiving a jury was to avoid fragmentation of the evidence, to eliminate any potential problems with instructions and to hopefully finally dispose of this protracted litigation without another time consuming and expensive trial.

This Court commends counsel for all parties for this procedure which should finally put this case to rest.

Supplemental evidence was offered by plaintiff on November 16, 1973 and by defendants on November 20, 1973.

After having again reviewed the evidence introduced at the 1970 trial and having heard and reviewed the supplemental evidence, this Court as finder of fact has concluded that defendants did have sufficient economic power over the tying product, loans under certain terms and condition, and that the defendant, Credit Corporation, did have a competitive advantage in the credit market to enable it to impose the tie-in agreement on plaintiff and that the defendants were, therefore, in violation of the Sherman Act. My detailed findings of fact and conclusions of law follow.

FINDINGS OF FACT

1. When this case was appealed to the Sixth Circuit Court of Appeals following the June, 1970 trial, a three volume Joint Appendix was printed and filed with the Sixth Circuit. Most of the evidence relied upon by the parties is contained in those three volumes. Any evidence or other material relied upon in these Findings which appears in the three volume Joint Appendix will simply be referred to by page number in parenthesis. All pleadings, testimony or exhibits relied upon which do not appear in the three volume Joint Appendix will be otherwise appropriately identified.

2. Fortner Enterprises, Inc., plaintiff herein, is a corporation organized under the laws of the Commonwealth of Kentucky with its principal place of business in Louisville, Jefferson County, Kentucky. Its principal stockholder is A. B. Fortner, Jr.

3. The defendant, United States Steel Corporation, is generally known to be the largest manufacturer of steel in the United States and is one of our Nation's largest corporations. For some time prior to 1959, one of United States Steel Corporation's Divisions has been known as the United States Steel Homes Division [hereinafter called Homes Division], which had as its function the manufacture and assembly of component parts which comprise various models of prefabricated house packages.

4. The defendant, U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation], is a separate

corporate entity owned by United States Steel Corporation and is, therefore, a subsidiary of United States Steel Corporation. The Credit Corporation was established in 1954 [Certificate of Incorporation, PX 2-E].

5. The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954 meeting [PX 1-M; 108], which recommended that a financing corporation be established to provide construction money and to originate mortgages for resale to investors [1088, 1089]. That exhibit indicates that the proposed finance corporation "... will not be used as a means to force sales to dealer-builders" [1090].

6. The United States Steel Corporation's Finance Committee Minutes [PX 1-W; 1095, 1096], authorized and directed the Credit Corporation to establish a "special" financing program of land acquisition and development loans to dealers in order to enable the Homes Division "... to obtain a minimum distribution of 1800 units in 1959, and such additional distribution as may be feasible ...". Those loans were to be "... without conformity with conventional or conservative patterns but within the bounds of prudent business judgment"; provided that the Homes Division underwrite and guarantee losses to a defined extent. Subsequent Finance Committee Minutes indicate that the program was authorized to assist in increasing sales of the Homes Division for 1960 and 1961 [1098].

7. The Court thus finds that there was a change in policy established by the defendants which resulted in Cred-

it Corporation's loans being used as a "tool" to aid the Homes Division in making sales of prefabricated house packages.

8. The Homes Division's factory and principal office in 1960 was located in Southern Indiana just across the Ohio River from the Louisville, Jefferson County, Kentucky area. The Homes Division at that time desired to expand its sales of prefabricated house packages in the Louisville, Jefferson County, Kentucky, area. At that time, Mr. A. B. Fortner, Jr., and another gentleman owned a corporation known as Iroquois Developers which owned a subdivision in Jefferson County, Kentucky. A portion of that subdivision had already been developed and the lots had been sold to builders who had built houses upon them. The remaining portion of that subdivision had been partially developed by the construction of streets and installation of necessary utilities and the remainder of the subdivision, while platted, was still undeveloped [PX 42 and 43; 1226-1228].

9. One of Mr. Fortner's salesmen learned of the special financing program of the Credit Corporation and advised the Homes Division personnel of Mr. Fortner's interest in the subdivision in Jefferson County, Kentucky. As a result, Mr. Fortner was contacted by Homes Division representatives and negotiations were commenced designed to interest Mr. Fortner in building prefabricated house packages in the subdivision [211, 212]. At that time Mr. Fortner was advised of the Credit Corporation's special financing program which could provide loans for land acquisition and

development as well as the purchase and building of the houses themselves [212].

10. Credit Corporation representatives then became involved in the negotiations which resulted in their offering Mr. Fortner 100% land acquisition and development loans plus all of the money which would be required to purchase the prefabricated house packages and build them [214, 215]. The negotiations at that point had been premised upon Mr. Fortner buying out the interest of his co-stockholder in Iroquois Developers. However, in Mid-1960, Mr. Fortner's co-stockholder, a Mr. Robards, indicated that he would not consent to be bought out and that he desired to attempt to undertake the development and buy out Mr. Fortner's interest. Mr. Fortner agreed to this and Mr. Robards then commenced negotiations with the Credit Corporation but could not make an arrangement with them. Mr. Robards then agreed to sell his interest to Mr. Fortner in Iroquois Developers and the negotiations between Mr. Fortner and the Credit Corporation were reactivated [PX 43; 1227, 1228].

11. The Credit Corporation then reaffirmed its offer of 100% land acquisition and development loans plus all of the money Mr. Fortner would require to purchase the prefabricated house packages and build the houses. This offer was conditioned upon an agreement that there would have to be erected on each lot in the subdivision a prefabricated house package manufactured by the defendant, United States Steel Corporation [220, 221].

12. A. B. Fortner, Jr., had for quite a number of years prior to 1959 owned a real estate brokerage company in Louisville, Kentucky, known as Zetwock-Fortner Corporation which had sold thousands of residential properties in the Louisville and Jefferson County, Kentucky area [206]. Mr. Fortner, through other companies, had been involved in real estate development and had also been involved in the construction of some residential dwellings. As a result, Mr. Fortner was personally familiar with the type of land acquisition and development loans available in the Louisville and Jefferson County area, and to his knowledge, particularly, 100% land acquisition and development loans were not available from any conventional lending source of any type or any source known to Mr. Fortner in 1959 or 1960 [221].

13. The type of loan offered Mr. Fortner by the Credit Corporation was highly attractive and unique to Mr. Fortner since to his knowledge no such loans were available from other sources and for that reason he was willing to accept at that time the requirement that he erect upon each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation.

14. Mr. Fortner, prior to and during 1960, owned all but a few shares of a corporation known as the Gold Rose Gift Shop. This corporation was dormant and had a $16,000.00 deficit, and it was agreed that its name would be changed to Fortner Enterprises, Inc., and that said corporation would purchase the subdivision in question from

Iroquois Developers. Mr. Fortner was not required to personally endorse or guarantee the loans to be made by Credit Corporation to Fortner Enterprises, Inc.

15. As a result of the above described negotiations, in October, 1960, notes, a mortgage and a loan agreement were executed by Fortner Enterprises in favor of the Credit Corporation [44-74]. The notes bore an interest rate of 6% and a fee or discount of ½ to 1%. The loan agreement specifically contained the requirement that Fortner Enterprises, Inc., purchase and erect on each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation. The contractual obligations represented by the notes, mortgage and loan agreement were between Fortner Enterprises, Inc., and the Credit Corporation. The United States Steel Corporation was not a party to that agreement. However, that agreement did specifically contain the tie-in requirement of the purchase and erection of the prefabricated house packages of the Homes Division of the United States Steel Corporation.

16. Since it is undisputed that the tie-in provision was in the loan agreement and since the defendants have offered no additional evidence raising any question as to the existence of the tie-in provision, in accordance with the last Opinion of the Sixth Circuit in this case, this Court finds as a matter of law that the tie-in agreement complained of by plaintiff did exist.

17. Following the execution of the notes, mortgages and loan agreement, Fortner Enterprises ordered and erected certain model homes, had a grand opening and commenced the sale of houses from the models [222-224]. Sales initially were quite good and Fortner Enterprises began building the houses sold in the first few months following the grand opening [231]. During the Summer of 1961, as Fortner Enterprises began building the homes which had been sold, an additional 32 lots became available in the subdivision which had been sold to a contractor who had become the General Superintendent for construction in the project in question. The Credit Corporation agreed to make another 100% land acquisition and development loan to add these 32 lots to the project with the loan also to meet all requirements for the purchase of the prefabricated house packages and building of the houses and this transaction was concluded in August, 1961 by the signing of a note, mortgage and loan agreement. That loan agreement also contained the tie-in provision referred to above [254-255].

18. During the June, 1970 trial of this action, plaintiff introduced substantial evidence which plaintiff claimed established that it had encountered certain problems with the Homes Division prefabricated house packages, including shortages of components upon delivery and defects in design and manufacture. Plaintiff claimed that as a result of these problems, its subdivision developed a bad reputation and lack of consumer acceptance which resulted in plaintiff's inability to sell additional houses. The evidence was introduced primarily to establish the fact of damage to the plaintiff which was resolved by the jury in the 1970 trial

in favor of the plaintiff. This evidence is alluded to in these Findings only as background for the events which occurred after plaintiff began complaining to the Homes Division about shortages and defects in design and manufacture of component parts.

19. Mr. Fortner testified that in the latter part of 1961 he contacted Mr. Richard Dyas, Vice President of the Credit Corporation, and advised him of the unsatisfactory character of the prefabricated house packages of the Homes Division and his company's inability to sell them and requested that Fortner Enterprises, Inc., be relieved of the tie-in provisions of the loan agreement in order that it might build another prefabricated house package or a conventional home. Mr. Dyas refused this request [256, 257].

Fortner Enterprises, Inc., continued to attempt to sell the Homes Division's prefabricated houses and continued to complain of the quality of those houses until June 5, 1962 when a meeting took place at the offices of counsel for the plaintiff which was attended by Mr. A. B. Fortner, Mr. Herman Miles and others representing the plaintiff and by Mr. Black and others representing the Homes Division of United States Steel Corporation and by Mr. Dyas and Mr. Rollings of the Credit Corporation. The Court finds that the witnesses for all parties agree that plaintiff's complaints concerning the prefabricated house packages were expressed at that meeting and that plaintiff sought to be relieved of the tie-in appearing in the loan agreements in order that plaintiff might build another type of prefabricated house or a conventional house in its subdivision there-

by making it possible to pay off its debt to the Credit Corporation. This request was refused by Mr. Dyas of the Credit Corporation [261-263].

20. The Court finds that Fortner Enterprises' account with the Credit Corporation was current as of the June 5, 1962 meeting [PX 242; 1300, 1301], but that immediately following the June 5, 1962 meeting the Credit Corporation began the preliminary steps required to foreclose upon the plaintiff's subdivision under the mortgage given as a part of the package [PX 126 and 127; 1247-1250; PX 132, 1258-1263]. As a result the Credit Corporation wrote the plaintiff on July 12, 1962 demanding payment of all outstanding obligations [PX 3; 75].

21. Shortly after the July 12, 1962 letter on July 19, 1962, this antitrust action was filed by plaintiff against both defendants [38-76].

22. The second required element of an illegal tie-in agreement violative of the Sherman Act is that a not insubstantial amount of interstate commerce in the tied product be restrained. Plaintiff's evidence established that under the two loan agreements entered into with the Credit Corporation plaintiff was required to purchase 210 prefabricated house packages. The least expensive house package which plaintiff was purchasing cost plaintiff approximately $3,150.00 [637]. This amounts to a total of $689,850.00 worth of house packages which plaintiff was obligated to purchase under the terms of the loan agreement and under the requirements of the tie-in contained therein. In addi-

tion, the undisputed evidence from the defendant's own records established that with insignificant exceptions, all loans made by the Credit Corporation contained the tie-in agreement [742-744] resulting in millions of dollars of sales of house packages by the Homes Division in 1960, 1961 and 1962 [1199]. Thus, the undisputed evidence established that substantial amounts of interstate commerce in the tied product, the prefabricated house packages, were restrained by the tie-in agreement, or agreements, complained of whether plaintiff's own purchases or commitments to purchase are viewed by themselves or whether they are viewed as a part of the larger volume of sales connected with Credit Corporation's entire lending program. Since no new evidence was introduced by defendants concerning this element of the case, in accordance with the Supreme Court's Opinion in this action and the last Opinion of the Sixth Circuit in this action, this Court finds as a matter of law that plaintiff has met its burden concerning this element and that as a matter of law a not insubstantial amount of interstate commerce in the tied product was restrained.

23. The third required element for the establishment of an illegal tie-in agreement violative of the Sherman Act involves the Credit Corporation's economic power over the tying product, in this case, loans under certain terms and conditions to appreciably restrain trade in the tied product. As previously indicated, this Court finds that the Credit Corporation did have sufficient economic power over the tying product or element and the evidence which leads the Court to this conclusion is set forth in the following series of Findings.

24. William H. Lang was President of the defendant, Credit Corporation, during all times pertinent to this litigation [895]. Portions of Mr. Lang's deposition were read into evidence by plaintiff. Mr. Lang testified that when a dealer, such as Fortner Enterprises, was not able to finance through local or normal channels, the Homes Division of the defendant, United States Steel Corporation, would call in the Credit Corporation to meet the dealers' financing problems [896]. Mr. Lang went on to testify that the Credit Corporation consistently aided the Homes Division sales program through aid given to dealers [897], and he went on to testify that the Credit Corporation had made loans at the insistence of the Homes Division when the Credit Corporation did not consider the loans to be a good financial risk when regular banking and financial principles were applied [897, 898]. Mr. Lang at the trial of this action itself testified that at the direction of defendant, United States Steel Corporation, the Credit Corporation instituted in 1958 its special financing program concerning land acquisition and development to help the Homes Division increase its sales of house packages, that the loans made at the request of the Homes Division under the special financing program were to be guaranteed by the Homes Division including specifically the Fortner Enterprises' loans [972-975]. Plaintiff's Exhibit 237 [1258], is the Underwriting Agreement in which the Homes Division guaranteed the land acquisition and development portions of the Fortner loans as well as loans made to a number of other dealers under the special financing program. This Court thus finds that the defendants' own witness has testified that the

loans made under the Credit Corporation's special financing program were a special type of loan not available from normal or conventional sources.

25. The Underwriting Agreement [Plaintiff's Exhibit 237, 1268], lists forty-three [43] separate loans which were classified as the high risk type loans for which the Credit Corporation wanted to be protected by the Homes Division [981]. These were all land acquisition and development loans [980].

26. Turning specifically to the loans made to Fortner Enterprises, Inc., for land acquisition and development, the evidence was undisputed that those loans made by Credit Corporation to Fortner Enterprises, Inc., amounted to 100% of Fortner Enterprises' cost to acquire the land in question and to develop it, including the installation of streets and all utilities to the point that the lots were ready to have houses built on them. This was the portion of the loan which the defendant, United States Steel Corporation, guaranteed to the Credit Corporation. The evidence also established that the construction portion of the loans from Credit Corporation to Fortner Enterprises amounted to all of the funds which Fortner Enterprises required under normal circumstances to build houses on the lots. The construction loan, of course, did not cover costs incurred by Fortner Enterprises at the closing of a sale to a purchaser, nor did they include Fortner Enterprises' profit.

27. The Court finds from Mr. Fortner's testimony that 100% land acquisition and development loans were quite

unique to Mr. Fortner as President of the plaintiff corporation. Mr. Fortner had been associated with the real estate business in many capacities for quite a number of years before the transactions in question. He had been involved himself in the development of subdivisions and in obtaining financing for such development, as well as in assisting in obtaining financing for customers or clients. Mr. Fortner was familiar with the types of land acquisition and development loans available in the Louisville area and he has testified that no such loans, to his knowledge, were available from any other source, particularly when the other significant terms of the loans were considered. Those terms were 6% interest plus ½ of 1% discount fee, along with no requirement of a personal guarantee by himself as President of the corporation or by any other officer of the corporation.

28. Mr. Fortner's testimony and other substantial evidence and testimony which were not contradicted by defendants have convinced this Court that the loans in question were unique. This Court has taken judicial notice that Federal statutes or regulations prohibit Federally insured banks and savings and loan associations from making 100% land acquisition and development loans. Mr. Edwin Horn, President of Louisville Mortgage Service Company, testified in this action. Louisville Mortgage Service Company at the time in question and for many years prior thereto has been in the business in Louisville, Kentucky, of making loans for commercial investors, including commercial banks and insurance companies. None of Mr. Horn's customers were making 100% land acquisition and development loans

on the terms given to Fortner Enterprises or any terms during this period of time and such loans to Mr. Horn's knowledge were not available in this area during that time.

29. Mr. Charles Henne of Prudential Life Insurance Company testified that as a matter of policy Prudential Life Insurance Company was not making any land and acquisition development loans during the period of time in question, much less 100% land acquisition and development loans.

30. Mr. Paul F. Semonin is one of the best known realtors and real estate developers in the Louisville and Jefferson County area. Mr. Semonin has been associated with the real estate business in this area for about 35 years [868]. During the period 1959 through 1961, Mr. Semonin was familiar with the type of financing available to developers and builders and his testimony was that there were not any 100% land acquisition and development loans available from normal or conventional sources during that period of time [868-869].

31. Plaintiff, as a part of its supplemental evidence presented on November 16, 1973, called Mr. Ralph Logan, President of Southern Savings & Loan Association, a Louisville, Kentucky state chartered savings and loan [November, 1973, Transcript, p. 139]. Southern Savings & Loan did not make any land acquisition and development loans during the pertinent period of 1959-1961 [p. 142]. The largest loan which Southern Savings has ever made has been somewhere between Two Hundred and Two Hundred

and Fifty Thousand Dollars [p. 143]. Mr. Logan testified that Southern Savings would not have made a land acquisition and development loan of the character which the Credit Corporation made to Fortner Enterprises whether or not Fortner Enterprises had a deficit at its beginning [pp. 143, 144]. Mr. Logan, as President of Southern Savings during 1959 through 1961, kept abreast of market conditions in the Louisville area and the types of loans that were available and he was unaware of any building and loan associations that would have made a 100% land acquisition loan during that period and he didn't know of any body making such loans during that period [p. 145]. In his opinion a 100% land acquisition and development loan is not a prudent loan due to the risk factor [p. 146].

32. Mr. Charles Will, President of Portland Federal Savings & Loan Association, was also called as a witness as a part of plaintiff's supplemental proof given in November, 1973 [p. 157]. Mr. Will testified that the Federal regulations applicable to Federally insured savings and loan associations in 1959 limited loans for land acquisition and development to 60% of the value of the raw land and 60% of the development cost [p. 158]. Mr. Will testified that his company could not under the regulations make a 100% land acquisition and development loan [p. 159], and even if they were not restricted by such regulations they would not make such a loan [p. 160]. Mr. Will pointed out that a 100% loan of that nature is not a conservative loan and amounts to the lender buying the property [p. 160]. Mr. Will, as President of Portland Federal, kept abreast of

market conditions and the types of loans made during the 1959-1961 period and to his knowledge no normal or conventional lending source was making 100% land acquisition and development loans during that period [pp. 162, 163]. Portland Federal did begin making some land acquisition and development loans at the 60% level in 1961 or 1966 and it is significant to this Court that the interest rate was 6% and the terms of the loans were generally for two years along with service fees which ranged up to 5% [pp. 160-162]. The Court thus finds that Portland Federal was able to obtain the same interest rate which the Credit Corporation obtained for a loan made for the same period of time, two years, as the Credit Corporation loan to the plaintiff and that Portland Federal was able to obtain a higher service fee for the loan even though the loan in relation to raw land value and development cost was 60% instead of the 100% loan which the Credit Corporation made. Clearly the land acquisition and development loan made by the Credit Corporation to Fortner Enterprises was more advantageous to Fortner Enterprises than the type of land acquisition and development loan which Portland Federal was making. Fortner Enterprises was able to obtain 40% more money at less cost than it theoretically could have obtained from Portland Federal.

33. The defendants called as their witness, Mr. Innes Dobbins, President of Liberty National Bank & Trust Company, as of the time of his testimony, in 1970 [415]. Dr. Dobbins testified as to the study made under his supervision of excess funds theoretically available for lending through banks, savings and loan associations and insurance

companies in the Louisville area during the years 1959 through 1962, but there is no evidence in the record that such funds were available for 100% land acquisition and development loans under the terms given the plaintiff in this case. Mr. Dobbins also testified that it was his understanding that during the pertinent period of 1959 through 1961 Prudential Insurance Company and Louisville Mortgage Service Company were making 100% land and acquisition development loans in this area [420, 421]. However, the Court recognizes that Mr. Horn of Louisville Mortgage Service Company and Mr. Henne of Prudential Life Insurance Company have both testified that their companies were not making such loans during that period, as set forth previously in these Findings. Mr. Dobbins also testified as to a comparison between the rate of earnings of the Credit Corporation and two Louisville Savings Associations of which he had knowledge and found the Credit Corporation's earnings comparable to the Savings and Loan Associations. This Court does not find this comparison to be of great evidentiary significance since it merely indicates that the Credit Corporation was able to make a profit comparable to that of the two Savings and Loan Associations with which its profits were compared in spite of the high risk type loans made under the special financing program. Since the special financing program loans of the Credit Corporation were guaranteed or underwritten by United States Steel Corporation, the Credit Corporation would certainly not be expected to show a loss at least as a result of those loans since any such loss would have been covered by United States Steel Corporation. This comparison merely confirms that the Credit Corporation's interest rate and discount or service fee were comparable to those charged by Savings and Loan Associations.

34. Stanley Mack was called by the plaintiff as a witness at the trial of this action in 1970 [438]. At the time of that trial Mr. Mack was employed by the defendant, Credit Corporation. Prior to that time he had been employed by the Homes Division of the defendant, United States Steel Corporation [439]. During the 1959 through 1961 period, Mr. Mack was the Manager of Sales Division and his job included sales training programs and seminars [439]. Mr. Mack identified Plaintiff's Exhibit 7 as a portion of the Homes Division's Sales Manual and it was duly offered into evidence [441]. Mr. Mack further identified the land acquisition and development portion of that Sales Manual as having been part of a refresher seminar given to the Homes Division personnel after consultation with the Credit Corporation [442-445]. Plaintiff's Exhibit 240 [1279], is a portion of the Sales Manual which is Plaintiff's Exhibit 7. Exhibit 240 was attached to Plaintiff's Exhibit 238 [1275], which is a letter from the head of the Homes Division, D. H. Boyd, to the Assistant General Solicitor of United States Steel Corporation dated August 1, 1962 and referring to this litigation. That letter states in part:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter.

In these cases our sales department, in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category." [1275, 1276].

It is clear from reading the Sales Manual of the Homes Division and the Credit Corporation's Minutes and other documents placed in evidence by plaintiff which were obtained from the defendants that the Credit Corporation's primary function was to make loans at whatever terms were required to obtain sales of prefabricated house packages for the Homes Division. In referring to land acquisition and development loans, the Sales Manual states:

> "When asked, 'What's your land development deal?', you can almost answer with the question, 'How high is up?'." [1287].

The Sales Manual concerning land acquisition and development loans goes on to point out that ". . . Most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge a ½ point fee." [1291].

Finally, that Sales Manual sums up the way in which the Credit Corporation was used as follows:

> "There have been a good number of special loans made in the past three years, each one a little different, but each one with some merit. Conversely, in some cases the Credit Corporation turned down what seemed to be a good real estate loan, but didn't look as though it would produce home shipments. I know of one case where there was a choice piece of ground, in an excellent location, supported by a strong market. The requested loan was to be guaranteed by a multi-million dollar corporation. From a pure real estate investment standpoint, it was excellent. However, we chose not to recommend the loan to the Credit Corporation because we couldn't see a full time qualified general manager or anyone in the organization with the ability or the time to merchandise our homes. In other words, I just didn't see how we would get very many houses shipped. Sure, the loan was secure, and the Credit Corporation would be paid back, but we wouldn't accomplish our only purpose in making the loan and that is shipping houses. That's why the Credit Corporation exists and that should be our first consideration before requesting financing assistance." [1296].

Concerning the leverage which the special financing program conferred to the Homes Division through the Credit Corporation, the Sales Manual states:

"Does this approach sound a little rough on the dealer? I don't think so. Remember, he helped to determine a conservative one year program of development, in this case 40 lots. But the loan is paid back in only 22 lots. All you're asking him to do is produce in two years what he said could be done in less than one. Do you see the lever that this gives you? He is more likely to push hard to sell our houses when there is a penalty if he doesn't. People like to take the line of least resistance. Before this clause was put in, a program could be opened, and start slowly. It was easy to say, 'It's obviously the product, we'll go back to conventional or something else.' Now a program is opened, sales start slowly and the thinking is, 'Let's bring in a new model,' or 'Let's improve on our advertising.' I think it gives us an excellent sales tool. It is not necessary for you to try to explain this to your dealer or prospect. It can be a matter of negotiation between the dealer and the Credit Corporation. I just wanted you to be aware of it." [1292].

35. Certain actions of the defendants confirm the application of the special financing program as described in the Sales Manual. In March, 1960, for example, while the negotiations were taking place which resulted in the October, 1960 agreements, the Credit Corporation was asking for assurances from the Homes Division that if Fortner Enterprises failed, the Homes Division would put the property in production or get another dealer to take over the project [PX C-21; 1134, 1135; PX 55, 1232, 1233].

Even earlier in January, 1960, a memorandum from Lang to Dyas [PX C-23, 1313] states:

"With regard to (b) above, we should know, if possible, or at least have confidence that the dealer can

make a satisfactory profit from the use of our product. With all of our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement, it is not the financial risk aspects which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen—and perhaps we have it at Broyhill—is an unsuccessful development. This precludes, in most cases, any other house sales in that area, because the one we have there has been unsuccessful."

Thus, the Court finds that the Credit Corporation was not so much concerned with the risks involved in loans but whether they would help sell houses.

36. Plaintiff propounded to defendant, Credit Corporation, Requests for Admissions which were introduced in their entirety as Plaintiff's Exhibit 2. In response to Request for Admission 19, the Credit Corporation admitted "that the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation for the years 1960, 1961 and 1962 are as follows: 1960, 68%; 1961, 70%; 1962, 75%."

The Credit Corporation in response to Request for Admissions 20, admitted that loan commitments for 1960 of the Credit Corporation totalled $22,625,805.00, for 1961 totalled $19,342,612.00 and for 1962 totalled $19,283,544.00.

The Credit Corporation in response to Request for Admissions 21, admitted that all loan commitments entered

into in 1960, 1961 and 1962 contained the tie-in provision which is the subject matter of this suit, with relatively insignificant exceptions totalling $627,000.00 [742-744].

37. Land financing loans [land acquisition and development loans] outstanding at the end of 1960 amounted to $5,372,000.00 [1353], while house package sales of the Homes Division for that same year amounted to $6,747,353.00 [1199]. Land financing loans outstanding at the end of 1961 amounted to $5,918,000.00 [1353], while house package sales of the Homes Division were $5,051,992.00 for that same year [1199].

38. An analysis of the loans dated prior to the end of the calendar year 1961 listed in the attachment to the Underwriting Agreement in which the defendant, United States Steel Corporation, guaranteed certain identified land acquisition and development loans which qualified under the special financing program including those made to the plaintiff amounted to $7,738,000.00 [1273, 1274], which figure was substantially in excess of the slightly over Five Million Dollars worth of house package sales made during the year 1961.

39. The evidence established that the Credit Corporation was funded by its parent corporation, United States Steel Corporation, partially by the purchase of stock, partially by loans from United States Steel to the Credit Corporation at an interest rate of one point above the applicable prime rate and partially through the Credit Corporation's borrowings from banks at the prime rate using the credit standing of United States Steel.

While United States Steel Corporation had elected to allow the Credit Corporation to obtain the bulk of the Credit Corporation's funds through borrowings from banks at the prime rate based on United States Steel's credit standing, the record also establishes that in July 1961, United States Steel had agreed to purchase, upon request of the Credit Corporation, an additional Nine Million Dollars' worth of stock and further had agreed to advance an additional Twenty-nine Million Dollars which would have been subsordinated to the bank loans [1101, 1102].

40. The Credit Corporation's financial statements [1349-1355], indicate that it paid no dividends to United States Steel and that it had full use of its accumulated income.

41. The annual report of the defendant, United States Steel Corporation, for 1961 was introduced into evidence [1185]. This report also contained the figures for 1960. That report indicates that United States Steel Corporation had net income after taxes in 1960 of $304,200,000.00 and in 1961, of $190,200,000.00. It had cash and securities of $451,700,000.00 in 1960, and of $642,200,000.00 in 1961, and it had total assets, less current liabilities in excess of 3.8 Billion Dollars in 1960 and in excess of 4.3 Billion Dollars in 1961.

42. An analysis of the Credit Corporation's income statements for 1960 and 1961 [1355], indicates that the bulk of the Credit Corporation's expenses represent interest on loans payable. Obviously the United States Steel Corpora-

tion elected to use its credit standing with banks to allow the Credit Corporation to obtain the bulk of its capital from banks at the prime rate instead of United States Steel Corporation simply injecting the necessary capital into the Credit Corporation through the purchase of stock which would not have cost the Credit Corporation anything for its use in terms of paying interest therefor.

43. Plaintiff called as a witness at the 1970 trial Mr. Herman Miles. Mr. Miles and his company were the supervisors of the construction at the plaintiff's project in question. Mr. Miles had had experience in house building and was president of a local lumber company. Mr. Miles had had vast experience in computing the cost of building houses. Mr. Miles testified as to a comparison which he had made of the prefabricated house package of the Homes Division with the cost of materials and assembly of a conventional house comparable to the Homes Division house package and found that the United States Steel house package was priced $455.00 more than the comparable components at the same point in a conventional home [637].

44. Plaintiff called as an expert witness Dr. John Masten on November 16, 1973 at the time plaintiff's supplemental evidence was presented. Reference to Dr. Masten's testimony in these Findings will, therefore, be to the Transcript of Evidence of the November, 1973 testimony.

Dr. John Masten has Bachelor and Master's Degrees from the University of Illinois and a Ph.D from the University of North Carolina. A rather extended summary of his background and qualifications and publications was filed without objection as Plaintiff's Exhibit 500.

Dr. Masten was a Professor at the University of Kentucky from 1948 to 1967. During the approximate five year period prior to his leaving the University of Kentucky in 1967, Dr. Masten had been the head of the Department of Economics and the Director of Graduate Study in Economics at the University of Kentucky (p. 22). Dr. Masten left the University of Kentucky in 1967 to go to the University of Georgia where he teaches courses in Commercial Banking at the undergraduate level and courses in Money and Capital at the graduate level [p. 21].

During Dr. Masten's 19 years at the University of Kentucky the principal area of his teaching responsibility had been devoted to the financial or banking field and he had been active in and the Director of the program sponsored by the State Department of Banking, the University of Kentucky and the Kentucky Bankers Association which operated the annual program of the Kentucky School of Bankers and he had continued to maintain that connection with the Kentucky School of Banking since his tenure at the University of Georgia [pp. 22, 23].

Dr. Masten, since he has been at the University of Georgia, has been the Program Director also of the Georgia Banking School. Both schools have a program that covers various areas of banking, including investments, management of bank funds, manpower utilization and most importantly, lending. In this connection, Dr. Masten constantly collects and reviews loan cases [pp. 23-26].

Dr. Masten has devoted a good deal of his time during the past 25 years to the collection of loan cases and study of them in Kentucky [p. 26]. As a result of his work as an Economic and Banking Specialist at the University of Kentucky and his work in banking, and particularly the lending aspects of banking in conjunction with the Kentucky Bankers Association, Dr. Masten has a general knowledge of the principles that bank and non-bank lenders would follow in making land acquisition and development loans in Kentucky, including the Louisville and Jefferson County area for the period 1959, 1960 and 1961 [p. 30].

The Court finds that Dr. Masten was highly qualified to testify in the lending and economic areas involved in this litigation and Dr. Masten's qualifications were certainly not questioned by counsel for the defendants. Dr. Masten's particular background in Kentucky, including the period of time involved in this lawsuit, especially qualify him to testify about lending policies and practices in the Kentucky area.

Dr. Masten first pointed out that all loans are not the same and that there are risk differentials that make each loan almost separate in its own characteristics [p. 27]. Assuming that all terms and conditions are the same, Dr. Masten pointed out that the larger the percentage of a land acquisition and development loan to cost of the land acquisition and development, the higher the risk of the loan becomes to the lender [p. 28].

He pointed out that a lender would want to be protected by some type of guarantee, whether it be in the context of the amount of the loan relative to the value of the property

or a guarantee by some third party [p. 28]. In other words, normally a lender will lend a borrower money if the borrower could prove that he really doesn't need it [p. 28].

It was brought out that Dr. Masten, in preparing for his testimony, had quite properly reviewed various key exhibits in this case including the Loan Agreement in question [Plaintiff's Exhibit 5], the Underwriting Agreement [Plaintiff's Exhibit 237], the Financial Statement of the defendant, United States Steel Corporation covering 1960-1961 [Plaintiff's Exhibit 31], and the 1961 and 1962 Financial Statements of the Credit Corporation [Attachments to Plaintiff's Exhibit 2].

In response to a hypothetical question which included the basic pertinent facts introduced into evidence in this litigation, such as the undisputed fact that the loans for land acquisition and development from the Credit Corporation to Fortner Enterprises represented 100% of the cost of land acquisition and development thereof, and that as of the time of the first such loan, Fortner Enterprises had a deficit of approximately $16,000.00, and that no personal guarantees were required of any officer of Fortner Enterprises, Dr. Masten testified that a loan such as was made to Fortner Enterprises would not have been available from normal channels of credit. He pointed out that this was a very unique kind of loan and that it was not the kind of loan you would normally find in the housing credit market at that time [pp. 31, 32].

Dr. Masten pointed out that this loan was unique in and of itself because it represented 100% of the cost of land acquisition and development particularly for the period of

time in question. Such a loan is of such a high risk nature so that a prudent lender would have been unwilling to have made a loan involving 100% risk [p. 32].

Dr. Masten pointed out that the period of time in question, namely, 1959, 1960 and 1961, was a period of economic stability and not a period of inflation and that there was a definite risk inherent in a 100% loan under such conditions of economic and price stability [pp. 32, 33]. He referred in support of his testimony that this was a period of economic stability to the wholesale price index.

One of the other unique characteristics of this loan as brought out by Dr. Masten was that the loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender, namely: United States Steel Corporation [p. 33]. Dr. Masten went on to point out how highly unusual it is for a company connected with the lender to guarantee the loan to the lender. The normal situation is for a company or person connected with or associated with the borrower to guarantee the loan to the lender [pp. 35, 36].

Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique and at the same time required the borrower to buy houses from the Homes Division as a condition of getting this unique type of loan [p. 33].

Dr. Masten pointed out that the rate of interest charged on these loans was 6% with a ½% fee. He pointed out that the prime rate at that time when all cost factors were considered would have run 5 to 5½% and that the loan to Fortner Enterprises was above the prime rate but still low considering the risk involved in making the loan and that

it would have been virtually impossible for Fortner Enterprises to have obtained a loan at that level of interest and fee from any other source [pp. 34, 35].

Dr. Masten pointed out that which had been previously established in the record, which was, that banks generally were prohibited by law from making 100% land acquisition and development loans as well as Federally insured savings and loan associations and that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved [p. 37].

It was Dr. Masten's Opinion that the Credit Corporation had economic power by granting terms to the borrower that were so distinctly unique that it was almost inconceivable that the funds could have been acquired from any other source [p. 38].

Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market [p. 39], and that if you only have one lender making such loans within that segment of the market, then that lender has economic power within that segment [p. 39].

Finally, Dr. Masten testified that in his opinion, based on his analysis of the situation, including the nature of the loans made by the Credit Corporation and the Credit Corporation's relationship with United States Steel Corporation that the Credit Corporation had definite leverage in the segment of the credit market related to land acquisition and development loans as a lender because of the unique-

ness of the terms of the loans made and that this leverage was exercised [pp. 47, 48].

45. Defendants called an expert witness, Mr. Karl Gustav Pearson, who was a Professor of Business Administration at the University of Michigan with a Bachelor of Arts degree, and he also was an Attorney [906]. Mr. Pearson had concentrated his work in the general real estate field but the record does not show that he had concentrated in financing or land acquisition and development loans.

Mr. Pearson expressed an opinion that 100% land acquisition and development loans were available in the Louisville area in 1959, 1960 and 1961 [912]. This opinion was based on a survey which Mr. Pearson allegedly made in Louisville in 1970 within six months prior to the June, 1970 trial. Pearson did not identify the persons or organizations which he surveyed in Louisville. Mr. Pearson believed that 100% land acquisition and development loans were available from savings and loan associations, real estate syndicates, joint ventures, suppliers of materials that went into construction, sub-contractors and individuals.

The Court finds that Mr. Pearson's testimony is against the great weight of the evidence introduced at the trial of this action and that it was without sufficient foundation to be given substantial weight by this Court.

~~Defendants listed as potential witnesses at the trial scheduled for November, 1973, two additional expert witnesses, Professor Thomas Gies and Professor Randolph McGhee, and counsel for defendants requested and received leave of Court to allow Professor McGhee to sit with coun-~~

~~sel for defendants and consult with them during the testimony of the plaintiff's expert, Dr. John Masten, given on November 12, 1973. However, neither of these experts was called by counsel for defendants as a witness as a part of defendants' supplemental evidence in November, 1973. The Court feels that a reasonable inference to be drawn from the defendants' failure to call their experts is that these experts would not have substantially contradicted or disagreed with the testimony of the plaintiff's expert, Dr. John Masten.~~ deleted JFG 8-9-74

46. The Court has reviewed the cross-examination of Dr. Masten by counsel for defendants. ~~As indicated above, counsel for defendants did not question the expertise of Dr. Masten.~~ The Court does not find that the cross-examination of Dr. Masten concerning the substance of his testimony materially altered or weakened that testimony as has been outlined in the previous Finding. Actually, on cross-examination, Dr. Masten really put this economic power aspect of this case in context when he pointed out at page 130 of the transcript that a 70% borrower has 30% of his own equity involved and has much more freedom in terms of his choice of lender. Such a borrower does not have to enter into any kind of an agreement which ties him to a certain product. JFG

CONCLUSIONS OF LAW

1. The basic principles on which this case must be decided are set forth in the Supreme Court's Opinion in this case in Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 and United States Steel Corporation v. Fortner Enterprises, Inc., 452 F. 2d 1095 (6th Cir. 1971).

The Sixth Circuit held that there were questions of fact to be decided concerning the so-called "economic power" aspects of the liability issues of this case. We are guided in particular by footnote 4 appearing at the end of the Sixth Circuit's Decision. The Sixth Circuit points out that if no additional evidence is introduced then there was a tie-in and a not insubstantial amount of interstate commerce in the tied product was affected. No additional evidence has been introduced as to these points and the Court thus finds as a matter of law that there was a tie-in and that the requirements as to the amount of commerce in the tied product have been met.

The Sixth Circuit established as a broad guide for the finder of fact on the economic power issue ". . . whether the Credit Corporation . . . had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . .' ". The issue was defined elsewhere in the Sixth Circuit's Opinion as being whether the Credit Corporation possessed leverage in the credit market sufficient to induce buyers in the market for prefabricated houses to accept a less competitive product. This leverage did not have to constitute monopoly power or market dominance.

The Sixth Circuit makes it clear that this Court as finder of fact must evaluate all of the evidence and reasonable inferences to be drawn therefrom in determinintg the economic power question.

2. This Court concludes under the guidelines established by the Supreme Court and the Sixth Circuit for this case that the Credit Corporation did have sufficient economic power or leverage to induce buyers, including Fortner Enterprises, to enter into the tie-in arrangement which required them to buy prefabricated house packages from the United States Steel Corporation. This Court finds that the purpose of the special financing program concerning land acquisition and development loans of the Credit Corporation was to be a "tool" to obtain sales of house packages. When United States Steel Corporation established the Credit Corporation it could have used some of its available cash to completely capitalize the Credit Corporation which would have placed the Credit Corporation's cost of money at a non-existent or very low level. Instead of electing this course of action, the United States Steel Corporation purchased a certain amount of stock in the Credit Corporation and allowed the Credit Corporation to use United States Steel's credit standing to borrow money from banks at the prime rate. The special loan program was instituted by the Credit Corporation at the authorization of the Finance Committee of United States Steel Corporation to enable the Homes Division of United States Steel Corporation to sell prefabricated houses. The loans to be made under that program were loans for land acquisition and development to borrowers who could not obtain such funds from conventional sources and these loans were guaranteed by United States Steel Corporation. Since the primary purpose and objective of the Credit Corporation was to assist the Homes Division in making house package sales, the Credit Corporation clearly was not expected to maximize profits and as a matter of fact from its own financial records clearly elected to charge interest rates

and fees commensurate with much lower risk loans than the Credit Corporation itself was making.

3. The Court finds that the Credit Corporation did have leverage in the credit market, or a segment thereof. The evidence established in this case that the land acquisition and development loans made by the Credit Corporation to the plaintiff with the tie-in involved were loans amounting to 100% of the cost of acquisition of land and development of the land at an interest rate of 6% with one-half of 1% fee for a two year term. The interest rate, fee and period of the loan were comparable to loans made by conventional lending institutions for land acquisition and development but no other conventional lending institution during the period of time in question was making 100% land acquisition and development loans while the Credit Corporation was. Many organizations, such as Federally insured banks and savings and loan associations, were prohibited by law or regulation from making such high percentage of loan to value loans. The other conventional lenders in the market at the time were not making such high percentage of loan to value loans because of the great risk involved. When the Credit Corporation elected to make such loans it set itself apart from other conventional lenders because it was in effect willing to take higher risks because it had a purpose or motive which other conventional lenders did not have, namely: to enable its parent, United States Steel Corporation, to sell prefabricated house packages. While some conventional lenders might be willing to take higher risks than others, the evidence is that during the period of time in question in this lawsuit no conventional lenders were willing to take the degree of risk which Credit Corporation was voluntarily and deliberately willing to take for its purposes. This was particularly true insofar as Fortner Enterprises was concerned.

Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those loans contained the tie-in provisions. The Credit Corporation thus utilized very effectively the special financing program to enable the Homes Division of United States Steel Corporation to sell millions of dollars of prefabricated houses. This is one of the elements of evidence establishing the economic power or leverage of the Credit Corporation. The fact that the Homes Division was able to obtain a higher price for its prefabricated package in the same condition of a conventional house is again evidence of the Credit Corporation's leverage, or economic power. While the defendants argue that the Homes Division had a loss during the period in question, the Court does not really find this significant since the Homes Division's loss might well have been greater if the loan program which apparently was its prime method of obtaining sales had not been utilized. Further, the Court does not feel that you can separate the Homes Division from United States Steel as a whole.

4. The Court finds that the only purpose of the Credit Corporation in making loans, particularly under the special financing category, was to increase the sales of prefabricated house packages by United States Steel Corporation. This is not the type of business justification contemplated by the decided cases, including the Supreme Court's Opin-

ion in this case. The Court does not find any evidence in this record to justify the arrangement attacked by the plaintiff.

5. The undisputed evidence established that the special financing program of the Credit Corporation was authorized by the Finance Committee of United States Steel Corporation. Loans were made by the Credit Corporation under that program under the direction of personnel of Homes Division. The United States Steel Corporation and the personnel of the Homes Division used the Credit Corporation's loans as a sales "tool".

6. The Court thus finds that all of the required elements of an illegal tie-in agreement did exist since the tie-in itself was present, a not insubstantial amount of interstate commerce in the tied product was restrained and the Credit Corporation did possess sufficient economic power or leverage to effect such restraint. The Court also finds that United States Steel Corporation and the Credit Corporation as separate corporate entities did combine or conspire to institute or put into effect this llegal tie-in agreement and that both defendants are responsible and liable therefor.

7. Since this Court has found a per se violation of Section 1 of the Sherman Act by the defendants pertaining to the illegal tie-in agreement, as described above, it is actually not necessary for this Court to decide whether the plaintiff has established a conspiracy to monopolize violative of Section 2 of the Sherman Act. However, since there may be an appeal of this action, the Court in the alterna-

tive does find that all of the elements of a conspiracy to monopolize do exist in this record. First, the Court finds that the defendants did combine or conspire to increase sales of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision. The making of the loans containing the tie-in provision were overt acts in and of themselves in furtherance of the combination or conspiracy. In the context of this particular suit, the Court also finds that the defendants combined or conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure. The Court finds that the millions of dollars of loans made under the special financing program affecting millions of dollars of sales of prefabricated house packages clearly affected a substantial amount of interstate commerce in both the loans themselves and the prefabricated house packages. Finally, the Court finds that the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation of the program constitutes the necessary evidence of intent to monopolize required. Thus, the evidence described in the Findings of Fact set forth above establishes an illegal conspiracy to monopolize in violation of Section 2 of the Sherman Act.

8. Having found the defendants to be guilty of the per se violation of Section 1 of the Sherman Act and the Sixth

Circuit having directed that only the issue of liability be re-tried since a jury has already decided the amount of plaintiff's damage and since a Judgment has already been entered for said damages trebled plus attorneys' fees and costs and said claim having been, therefore, previously established as to amount and thereby liquidated, a Judgment will be entered in this action for the total amount of that previous Judgment of $427,016.75 bearing interest at the rate of 6% per annum from September 18, 1970, until paid. Having found for the plaintiff in this action and the Sixth Circuit Court of Appeals having held that costs should be taxed against the defendants as a result of the last appeal to the Sixth Circuit, the Judgment to be entered will also contain an additional award of attorneys' fees and costs to the plaintiff in this action. Counsel for the plaintiff shall prepare and file the necessary Motion for award of attorneys' fees and costs with supporting Affidavits within twenty days of the entry of these Findings and counsel for defendants shall have twenty days thereafter in which to respond.

/s/ James F. Gordon
James F. Gordon
United States District Judge

Copies to:
Mr. Kenneth L. Anderson
Mr. A. Scott Hamilton
Mr. Albert F. Reutlinger

Entered Aug. 13, 1974.

Appendix C

1975 Opinion of the United States Court of Appeals for the Sixth Circuit

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 75-1208

FORTNER ENTERPRISES, INC.,
Plaintiff-Appellee,
v.
UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORP.,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division

Decided and Filed October 3, 1975

Before: WEICK and MILLER, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This private antitrust action is before us on appeal for the third time in twelve years. The action involves a tying arrangement in which U. S. Steel

tied the purchase of prefabricated houses to credit given to finance the acquisition and development of land on which they were to be built.

The Homes Division of U. S. Steel manufacturers prefabricated houses and sells them through builder-dealers like the plaintiff. In 1954 its wholly-owned subsidiary, the Credit Corporation, was founded to provide financial assistance to those builder-dealers who were unable to obtain suitable financing from more conventional sources. Initially, the Credit Corporation's assistance was limited to financing purchase and construction of the houses, but it later was extended in some cases to acquisition and development of land on which the houses were to be built. In 1958 a program of "special assistance" was begun whereby credit was made available in certain high risk situations without regard to "conventional or conservative patterns but within the bounds of prudent business judgment." The Homes Division guaranteed these special loans to protect the Credit Corporation from loss. The purpose of Credit Corporation's regular and special financing was always to assist the Homes Division's house sales.

In 1959 the Homes Division became interested in land available for development in an existing subdivision in Louisville, Kentucky. U. S. Steel initiated discussions with one A. B. Fortner, a successful real estate developer, looking toward entering the Louisville prefabricated housing market. The negotiations resulted in an agreement whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would acquire a portion of the subdivision and would become a franchised builder-dealer of the Homes

Division product. The Credit Corporation would extend credit to the plaintiff for acquisition of 187 lots in the subdivision and development of the undeveloped lots conditioned on the construction, on each of the lots purchased by plaintiff, of a prefabricated house of the Homes Division of U. S. Steel. In addition to covering the cost of acquisition and development of the lots, a portion of the initial loan was to cover purchase and construction of the houses. The land loan equalled 100% of the cost of the land acquisition and development. Plaintiff's land financing was in the "special assistance" category.

Plaintiff later began to experience difficulties with U. S. Steel products, including the omission of parts and the delivery of defective parts. Homeowners, who had purchased the homes from Fortner began to complain. About this time Fortner requested (and received on the same terms) additional financing for the purchase and development of more lots in the subdivision on which Homes Division houses were to be placed. On August 2, 1961, to secure the additional financing Fortner executed a land and mortgage note and a construction note. After experiencing further difficulties with the prefabricated houses and running out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. The request was refused although Fortner was advised that he was free to refinance the Credit Corporation's loan and obtain houses from other sources. In July, 1962, he instituted this action, charging that defendants U. S. Steel and Credit Corporation had violated Sections 1 and 2 of the Sherman Act.

Appendix C

The district judge granted summary judgment in favor of defendants. This Court affirmed without opinion. The Supreme Court reversed in a 5-4 decision and remanded for trial. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969). Following a one-month jury trial, the district court directed a verdict for plaintiff on the issues of liability under the Sherman Act. Defendants' motion for a directed verdict was denied. The question of damages was submitted to the jury which returned a verdict of $93,200. This amount was trebled by the court in accordance with the provisions of the Sherman Act. The defendants did not appeal the damages issue, but limited their appeal to the issue of liability. This Court reversed the district court's judgment directing a verdict for plaintiff. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F.2d 1095 (6th Cir. 1971), *cert. denied*, 406 U.S. 1019 (1972). Although we found that the agreement was in fact a tie-in and that a not insubstantial amount of interstate commerce in the tied product was affected, we remanded for trial on the issue of sufficient economic power.[1]

The parties on remand agreed to waive a jury trial and to submit the liability issue to the court on the evidence previously taken, as supplemented by some additional evidence. Adopting the findings of fact and conclusions of law proposed by plaintiff, the court found the liability issues under Sections 1 and 2 of the Sherman Act in favor of the plaintiff. Judgment was entered accordingly.

1. The two elements required for a finding that a tying arrangement is a per se violation of Section 1 are set forth in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947): (1) a party (seller) must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product and (2) a not insubstantial amount of interstate commerce must be affected.

Appendix C

Defendants advance a number of arguments on appeal. The most significant of these involves the question of whether the district court applied the proper legal criteria for determining the economic power issue. Two other arguments will require consideration.

Defendants challenge the district court's findings on the question of economic power as being clearly erroneous.[2] On this issue plaintiff relies heavily on its view that the Credit Corporation loans were uniquely favorable to establish that defendants possessed the requisite economic power in the credit market. Defendants argue that the characterization of the loans here as 100% financing is incorrect because this figure was used to refer to 100% of Fortner's cost to acquire and develop the land, while the generally accepted meaning of a loan's percentage is the proportion it bears to the value of the land. They contend that the value of the lots acquired by plaintiff substantially exceeded the loan commitments and that there was thus no 100% financing. A careful examination of the record indicates that the district court's determination that these loans were unique because they were 100% land acquisition and development

2. We consider the clearly erroneous standard the proper standard for defining the scope of appellate review of factual findings by the district court. Defendants contend that more careful scrutiny of the record is required when a district judge, as here, adopts the proposed findings and conclusions of one party almost verbatim than when his findings clearly reflect the court's own thought processes. They also point out that district court's findings are less conclusive when, as in this case, they are not based upon an assessment of witness credibility. While there may be some merit in both arguments, *see, e.g., A. J. Industries, Inc.* v. *Dayton Steel Foundry Co.*, 394 F.2d 357, 361-62 (6th Cir. 1968); *Roberts* v. *Ross*, 344 F.2d 747, 752 (3d Cir. 1965); *Louis Dreyfus & Cie.* v. *Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962), departure from the clearly erroneous standard would not be required.

loans is not clearly erroneous. The testimony of plaintiff's witnesses does not suggest that any of them misunderstood the context in which the 100% figure was used in this case. Since these witnesses were able to testify that a loan for 100% of the cost to acquire and develop property was unique at that time in the Louisville area, it is irrelevant that the percentage of the loan might be characterized in another way.

Defendants also claim that even if the evidence establishes that these were 100% loans which were unavailable elsewhere, the record fails to establish that the loans to plaintiff were more favorable than those available from other sources when all of the conditions of the respective loans are compared. When this case was before this Court in 1971, we recognized that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F.2d at 1101. While the testimony did not compare every relevant term of plaintiff's loans with terms of loans available elsewhere, we conclude that there was enough evidence[3] from which the district court could properly infer that the loans to plaintiff were uniquely favorable and that its findings in this respect are not clearly erroneous.

Defendants urgently insist that the district court failed to apply the proper criteria in determining that the defendants had sufficient economic power in the credit market to

3. This evidence included plaintiff's own conclusion that the loan was uniquely favorable, testimony by representatives of other lending institutions comparing the terms and conditions of loans they were making at this time to those of plaintiff's loans, and the conclusion of plaintiff's expert witness that the loans were uniquely favorable.

establish the *per se* illegality of the tying arrangement. The appropriate legal standard for this case was defined by the Supreme Court in its opinion reversing the original granting of summary judgment in this case in defendants' favor. *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495 (1969). The same standard was indicated by this Court's opinion reversing the district court's granting of a directed verdict for the plaintiff on the issue of liability. *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 452 F.2d 1095 (6th Cir. 1971).

In its opinion, the Supreme Court stated that "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers in the market." 394 U.S. at 504. Then, in holding that plaintiff was entitled to a trial under this standard, the Court said that the higher price charged for U. S. Steel homes as compared to the price for similar models of other manufacturers "may suggest that respondents had some special economic power in the credit market." *Id.* In addition, the Court pointed to the claim that the loan was uniquely advantageous to plaintiff as possibly reflecting some sort of economic advantage of U. S. Steel over its competitors. *Id.* at 505-06. However, the Court rejected the argument that economic power could be inferred simply because the terms of a loan are unique. *Id.* at 505. In a footnote which has received much attention the Court went on to say that "uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves." *Id.* at 505,

n. 2. The Court noted that possible barriers could be legal, physical, or economic, as when the seller has a cost advantage in producing the tied product. *Id.*

When the case was before this Court after the directed verdict, we emphasized the Supreme Court's rejection of the argument that uniqueness alone constitutes proof of sufficient economic power and discussed, in light of the evidence presented, the factors which the Court thought would show economic power because they would prevent others from making similar loans. 452 F.2d at 1101. We concluded that plaintiff had made a prima facie case of economic power, but was not entitled to a directed verdict because of varying inferences which could be drawn from the record. *Id.* at 1097, 1101-03. Pointing out that the Supreme Court did not determine precisely what effect the comparatively higher prices for the Homes Division houses should have, we said that the probative value of this evidence should be determined by the trier of facts. *Id.* at 1103. We also noted that the Supreme Court in *Fortner* did not hold that "acceptance of the tie-in by customers without more is proof of economic power," since if this had been the holding, Mr. Justice Black hardly would have been required to discuss the economic power issue so exhaustively. *Id.* In a footnote, we also stated that we had not discussed all of the evidence bearing on the economic power issue which should be considered by a jury on remand, and further that the economic power standard "*must* vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence, . . . free from the limitations of an arbitrary definition." *Id.* at 1103, n. 4.

These two opinions, considered together, show that plaintiff may not rely on uniqueness alone as a source of economic power in the credit market. Rather, as the Supreme Court opinion makes clear, if uniqueness is the only indication of economic power relied upon, a plaintiff must show that competitors are prevented in some way from offering the unique product themselves. 394 U.S. at 505. However, if other factors in addition to uniqueness are relied upon as indicators of economic power, the requirement of showing that competitors are prevented from offering the product is less stringent. In this type of situation the entire range of evidence—evidence of uniqueness as well as other relevant evidence—should be considered by the trier of the facts.

Thus, in this case, plaintiff might prevail even if it failed to show that other lending institutions were prevented from offering a loan on equally favorable terms, if it could show sufficient economic power by other evidence. Other evidence might include such factors as the non-competitive higher price of the tied product or the number of buyers accepting the tie-in—both of which were mentioned by the Supreme Court and by this Court. 394 U.S. at 504; 452 F.2d at 1103. When a plaintiff does not rely on uniqueness alone, it is the overall sufficiency of the evidence which is controlling. We have recognized that customer acceptance of the tie-in without more is not sufficient to show economic power and have suggested that a non-competitive price is of uncertain probative value. 452 F.2d at 1103. Yet, a number of such factors considered together may be sufficiently probative.

Here we must determine whether the district court applied proper criteria in its findings with respect to the element of economic power or leverage. If plaintiff relied solely on claims of uniqueness of the loans, its case for establishing that defendants had economic power in the credit market on the facts of the present case would be quite weak. Neither legal barriers nor a cost advantage, the two factors mentioned by the Supreme Court, were clearly shown to have prevented other lenders from making these loans. While the court below took notice that national banks and federal savings and loan associations were legally prohibited from making 100% loans, there was no similar evidence as to the many other types of lending institutions. Nor was there evidence that any lender was prohibited from varying other terms of loans so as to offer equally favorable financing. Although there was some evidence relevant to the existence of a cost advantage, the trial court failed to make any findings on this issue and plaintiff does not contend on appeal that a cost advantage was established. Indeed, the district court's findings suggest that, except for national banks and federal savings and loan associations, other lending institutions were not making such high percentage loans only because of their unwillingness to take the risk involved.

Plaintiff argues, however, that uniqueness did establish economic power in this case because other lending institutions in Louisville were not making loans at the time comparable to those made to plaintiff. It is insisted that the reasons such loans were not made is irrelevant. We must reject this argument and agree with defendants that the

proper concern is not availability of the loans but the ability of other lenders to make them.

Since, however, the evidence offered by plaintiff to show economic power is not limited to the loan's uniqueness, the trial court was free to evaluate the other evidence along with the evidence of economic power derived from uniqueness in determining that defendants had sufficient economic power in the credit market appreciably to restrain free competition for prefabricated houses. Other evidence indicated that there was a substantial volume of business involving the tied product, that an appreciable number of customers accepted the tied product, and that the Homes Division houses cost $455 more than comparable homes. It is clear from the trial court's findings and conclusions that such evidence was evaluated. For example, in weighing the evidence, the district court stated:

> Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those loans contained the tie-in provisions. The Credit Corporation thus utilized very effectively the special financing program to enable the Homes Division of United States Steel Corporation to sell millions of dollars of prefabricated houses. This is one of the elements of evidence establishing the economic power or leverage of the Credit Corporation. The fact that the Homes Division was able to obtain a higher price for its prefabricated package in the same condition of a conventional house is again evidence of the Credit Corporation's leverage, or economic power.

We conclude that, despite the district court's failure to find the factors suggested by the Supreme Court which

would allow uniqueness to be relied upon as the only source of economic power, plaintiff presented other evidence from which the requisite economic power or leverage could properly be inferred.

Finally, defendants contend that there was no violation of Section 1 because the record shows that no competition in the tied product was actually foreclosed.[4] They base this contention on testimony of Fortner which, as they read it, would indicate that without the financing here, Fortner Enterprises would not have bought houses from any competitor of the Homes Division.

Recent cases have recognized that actual foreclosure of competition must be shown to establish an illegal tying arrangement. *Grossman Development Co.* v. *Detroit Lions, Inc.*, 1973-2 Trade Cases §74,790 at pp. 95,939-95,940 (E.D. Mich. 1973), *aff'd w/o opinion*, 503 F.2d 1404 (6th Cir. 1974); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974), *cert. denied*, 419 U.S. 1022 (1974). We do not interpret Fortner's testimony as indicating that no competition was actually foreclosed by the tie-in. The portion of the testimony directly responsive to the question asked shows only that Fortner would not have bought U. S. Steel homes without the financing, not that he would not have bought other homes. The thrust of the total testimony clearly shows that someone, either Fortner Enterprises or others for whom Fortner would have handled sales of

4. The Supreme Court and this Court, while addressing themselves primarily to the substantiality of the amount of competition foreclosed, evidently felt that there was no problem in determining that foreclosure of competition had occurred. However, as defendants point out, neither of these courts had before them the testimony of Fortner discussed above.

houses, would have bought the homes of competitors of U. S. Steel if no similar credit had been offered, and thus that some competition was foreclosed.[5]

As we have concluded that the district court correctly found that a violation of Section 1 was established, it is unnecessary to consider whether the finding of a violation of Section 2 may also be upheld.

AFFIRMED.

5. This testimony was as follows:

Q. Mr. Fortner, at the time the October 28, 1960, loan agreement was signed would Fortner Enterprises have purchased the prefabricated house packages manufactured by the United States Steel Corporation without the financing offered by and made available in that loan agreement?

A. No, we would not. We would have stuck with some of the others that we was already having good success with. This Empire Homes, we had built eighty-seven of 'em, or Mr. Walzer had, and we handled them for him without any trouble whatsoever, but they didn't have any financing like that.

Q. When you say that you handled the eighty-seven homes for Mr. Walzer, what do you mean by that, sir?

A. We sold him the ground and, uh, we helped him with his financing and we handled the sales for him.

Appendix D

Listing of Legal Commentaries Devoted to This Court's Prior Decision in This Case

Baker, "Another Look At Franchise Tie-Ins After Texaco and Fortner," 14 Antitrust Bull. 767 (1969)

Dam, "Fortner Enterprises v. United States Steel: 'Neither A Borrower, Nor A Lender Be,' " 1969 Supreme Court Rev. 1

Comment, "Anti-Trust Tying Arrangements," 9 Washburn L. J. 282 (1970)

Handler, "Antitrust: 1969," 55 Cornell L. Rev. 161 (1970)

Nelson, "Tying Arrangements Reconsidered: A Review of Fortner Enterprises, Inc. v. U. S. Steel Corp. et al.," 15 Antitrust Bull. 7 (1970)

Note, "Antitrust Law—Tying Agreements, The 'Per Se' Rule, And Credit," 23 Southwestern L. J. 907 (1969)

Note, "Antitrust Law—Tying Arrangements And Per Se Illegality," 38 U. of Mo. at Kansas City, L. R. 483 (1970)

Note ,"Antitrust Laws—When A Not Insubstantial Portion Of Interstate Commerce Is Affected, The Conditioning Of Uniquely Advantageous Financing Terms Upon The Purchase Of Prefabricated Houses Raises A Jury Question On The Issue Of An Illegal Tying Arrangement," 47 Texas L. Rev. 1449 (1969)

Appendix D

Note, "Antitrust—Tying Arrangements—A Re-examination Of The Per Se Rule And Identification Of Tying Arrangements," 48 N. Carolina L. Rev. 309 (1970)

Note, "Corporate Tying Arrangements Illegal Per Se When the Tying Product Is 'Unique' and the Dollar-Volume Of The Tied Product Is Not Merely DeMinimis," 21 Syracuse L. Rev. 245 (1969)

Note, "Credit As A Tying Product," 69 Col. L. Rev. 1435 (1969)

Note, "The Logic of Foreclosure: Tie-In Doctrine After Fortner v. U. S. Steel," 79 Yale L. J. 86 (1969)

Note, "Per Se Illegality Of Tying Arrangements Involving Credit Financing," 50 Boston U. L. Rev. 125 (1970)

Note, "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 7, 235 (1969)

Panel Discussion, "Recent Trends In Supreme Court Antitrust Decisons: Commentary—Past, Present and Future," 38 Antitrust L. J. 602, 614 (1969)

Tingle, "Financial Assistance As A Tying Product—Fortner Enterprises v. U. S. Steel," 25 Business Lawyer 121 (1969)

Appendix E

Listing of Cases in Which Credit Alleged to Be the Tying Element in an Unlawful Tying Arrangement

Addrisi v. *Equitable Life Assurance Society of the United States,* 503 F. 2d 725 (9th Cir. 1974), *cert. denied,* 420 U. S. 929 (1975)

Anderson v. *Home Style Stores, Inc.,* 381 F. Supp. 402 (E.D. Pa. 1974), *aff'd w/o opinion,* 511 F. 2d 1392 (3rd Cir. 1975)

Atlantic Richfield Co. v. *Malco Petroleum, Inc.,* 471 F. 2d 1258 (6th Cir. 1972)

Beck v. *Athens Building Loan & Savings Association,* Civ. No. 73-605 (M.D. Pa. 1974)

Carlson Companies, Inc. v. *The Sperry and Hutchinson Co.,* 374 F. Supp. 1080 (D. Minn. 1973)

Champion Oil Service Co. v. *Sinclair Refining Co.,* 502 F.2d 709 (6th Cir. 1974), *cert. denied,* 420 U.S. 930 (1975)

Cities Service Oil Co. v. *Coleman Oil Co., Inc.,* 470 F. 2d 925 (1st Cir. 1972), *cert. denied,* 411 U.S. 967 (1973)

Clark v. *United Bank of Denver National Association,* 480 F. 2d 235 (10th Cir. 1973), *cert. denied,* 414 U.S. 1004 (1973)

Deaktor v. *Fox Grocery Co.,* 332 F. Supp. 536 (W.D. Pa. 1971), *aff'd,* 475 F. 2d 1112 (3rd Cir. 1972)

Dexter v. *Equitable Life Assurance Society of the United States,* 1975-2 Trade Cases ¶60,601 (2d Cir. 1975)

Forrest v. *The Capital Building & Loan Association,* 385 F. Supp. 831 (M.D. La. 1973), *aff'd,* 504 F.2d 891 (5th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975)

Fry v. *John Hancock Mutual Insurance Co.*, 355 F. Supp. 1151 (N.D. Tex. 1973)

In the Matter of United States Steel Corp., 81 F.T.C. 629 (1972)

Maywood Sportservice, Inc. v. *Maywood Park Trotting Association, Inc.*, 14 Ill. App. 2d 181, 302 N.E. 2d 79 (1973)

Missouri Portland Cement Co. v. *Denny Concrete Co., Inc.*, 499 S.W. 2d 432 (Mo. 1973)

Monona Shores, Inc. v. *United States Steel Corp.*, 374 F. Supp. 930 (D. Minn. 1973)

Mortensen v. *First Federal Savings and Loan Assn.*, 1975-2 Trade Cases ¶60,570 (D.N.J. 1975)

Plekowski v. *Ralston Purina Co.*, 1975 Trade Cases ¶60,411 (M.D. Ga. 1975)

Polycast Technology Corp v. *Rohm & Haas Co.*, 305 A. 2d 323 (Del. 1973)

Q-T Markets, Inc. v. *Fleming Companies, Inc.*, 1975-2 Trade Cases ¶60,507 (D. Colo. 1975)

Sommers v. *Abraham Lincoln Federal Savings and Loan Association*, Civ. No. 72-2269 (E.D. Pa. 1975)

Southern Concrete Co. v. *United States Steel Corp.*, 1975 Trade Cases ¶60,553 (N.D. Ga. 1975), *appeal pending*, (5th Cir., No. 75-2987)

Spens v. *Citizens Federal Savings & Loan Association of Chicago Heights*, 364 F. Supp. 1161 (N.D. Ill. 1973)

Stavrides v. *Mellon National Bank & Trust Co.*, 353 F. Supp. 1072 (W.D. Pa. 1973), *aff'd*, 487 F. 2d 953 (3rd Cir. 1973)

Trans World Airlines v. *Hughes*, 449 F. 2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973)

Twin City Sportservice, Inc. v. *Charles O. Finley & Co. Inc.*, 512 F. 2d 1264 (9th Cir. 1975), *rev'g*, 365 F. Supp. 235 (N.D. Cal. 1972)

United States Steel Corp. v. *FTC*, 426 F. 2d 592 (6th Cir. 1970)

Wendkos v. *ABC Consolidated Corp.*, 379 F. Supp. 15 (E.D. Pa. 1974)